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Supreme Court of the United States

October Term, 1958

No. 250

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant below,

versus

ROY TULLY, ET AL., *Respondents-Plaintiffs below*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals
Ninth Supreme Judicial District
Beaumont, Texas

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Petitioner prays for issuance of a writ of certiorari to review the judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. The Supreme Court of Texas refused Petitioner's application for writ of error. A motion for rehearing was overruled by the Supreme Court of Texas on May 14, 1958.

Opinions Below

Petitioner removed this case to the Federal Court. The case was remanded to the State Court on Plaintiff's motion presented to the District Court for the Eastern District of Texas. The U. S. District Court's decision dated November 19, 1953 is unreported but is set out in the Appendix pages 51, 52.

Judgment was entered by the 60th District Court of Texas at Beaumont, Texas, against the Petitioner-Defendant. See Appendix pages 5-25. This judgment was affirmed by two judges of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. See Appendix pages 25-51. The opinion is reported in 305 S.W. 2d 805. The Texas Supreme Court ruled that the petition for writ of error presented no error which requires reversal of the judgment of the Texas Court of Appeals. Petitioner's motion for rehearing was overruled. See Appendix page 50.

Jurisdiction

Judgment of the trial court for plaintiff was affirmed by the Court of Civil Appeals of Texas on September 19, 1957 and a motion for rehearing was overruled on October 16, 1957. An application for a writ of error to the Texas Supreme Court was refused on April 16, 1958, and a timely motion for rehearing was overruled on May 14, 1958. Jurisdiction of this Court is invoked under 28 *U.S.C.* 1257 (3) on the grounds that a Federal easement and the rights, privileges and immunity of a Federal dredging contractor are involved as well as a Federal question relating to the Constitution and laws of the United States including various River and Harbor Acts of the United States, Title 33 *U. S. Code* (Appendix pages 1-5), and a Federal dredging contract (Defendant's Original Exhibit 3) and a Federal dredging easement. Appended to this petition pages 25-27 (Defendant's original exhibit 1).

Questions Presented

1. Whether State Courts, in a civil action filed by a private citizen not in privity to a Federal dredging contract, can divest Congress, the Secretary of Army and the designated Contracting Officer of the Corps of Engineers U. S. Army, of the exclusive right, power and authority to construe its own Federal dredging contracts and the right to determine the manner in which they are performed and at the same time disregard the Federal Government's decision that its dredging contract was completed according to Federal plans and specifications and that their agent did not exceed its authority and executed the will of Congress.[1]

2. Whether a State Court can assume jurisdiction of a lawsuit, filed by the grantor of a Federal dredging easement against a Federal dredging contractor, for willful trespass upon a Federal dredging easement, when the easement grants to the Federal Government and its agents the right to do the very acts complained of, to-wit: to deposit dredged material from the Intracoastal Canal anywhere upon grantor's land adjoining the Canal.[2]

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[1] This Court ruled in **Yearsley v. Ross Construction Co.**, 309 U.S. 18, that "if the will of Congress was executed" the agent could not be sued. No State has ever before attempted to adjudicate the question of whether a Federal agent properly performed its Federal dredging contract after the Federal Government accepted performance and paid for the work done or challenged this Court's ruling in the cited case. Also see **U. S. v. Appalachian Electric Power Co.**, 311 U.S. 377 (1940).

[2] See Government Easement appended to this Petition, pages 25-28. Defendant's Original Exhibit No. 1.

3. Whether a Federal dredging contractor, acting under the supervision, direction and control of the Corps of Engineers U. S. Army, can be held liable in a State Court for improper performance of a Federal dredging contract after the Federal Government, with full knowledge of all the acts complained of, certifies that the dredging work was completed according to Federal plans and specifications[3] and accepts and pays for the dredging service performed.

4. Whether a servient riparian landowner, can establish a negligence and trespass action against a Federal dredging contractor based upon the performance of a Federal dredging contract, where a contractual duty exists solely between the contractor and the United States and there is no proof that the Federal dredging contractor owed any "duty" to the servient riparian landowner who had previously granted to the United States and its agents, the right to deposit dredged material upon the land in question and warranted that the land would not be used so as to "interfere with or abridge the rights and easements" granted to the United States.[4]

5. Whether a Federal dredging contractor is deprived of property without due process of law when a State Court renders a judgment against it based upon the manner in which dredging services were performed under the supervision, direction and control of the Federal Government,

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[3] See Certificate of Completion, page 10, infra.

[4] **House v. Houston Waterworks**, 88 Texas 233, 31 S.W. 179, 181 (1885), Sup. Ct. Texas holds that where a third party is not in privity to a Government contract no duty is owed and he has no cause of action against the contractor.

After the Federal Government approves the contractor's performance of a dredging contract the Federal Government adopts the acts of its agent. **Yearsley v. Ross Construction Co.**, 309 U.S. 18, 21 (1940).

and where the Federal agent's acts are adopted, approved, certified and accepted as being completed in accordance with Federal specifications and contract drawings.[5]

6. Whether State Courts can assume admiralty jurisdiction of a lawsuit involving a maritime tort based upon improper performance of a maritime dredging contract, to which respondent is not in privity, when all of the parties to the maritime contract are not before the State Court and the rights of the parties are not governed by the uniform system of admiralty law and the rules of pleading, practice and procedure of that system of law.[6]

7. Whether a landowner, who relies upon the terms of a Federal dredging contract to establish a claim for damages against a Federal dredging contractor, must comply with all the terms of the Federal dredging contract before a lawsuit can be filed, where the Federal contract provides that all "disputes" concerning the contract, not disposed of by mutual agreement, "shall be decided by the Contracting Officer" as distinguished from local State Courts[7] and where the contract provides that in order to reopen the Federal dredging contract, there must be evidence of "collusion, fraud or error".[8]

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[5] Certificate of Completion quoted infra page 10, and **Yearsley v. Ross Construction Co.**, 309 U.S. 18, 21 (1940), which holds that the Federal agent cannot be sued after the Federal government accepts the agent's work.

[6] 46 **U.S.C.** 740, and General Admiralty Rules by this Court.

[7] The dispute as to whether or not the dredged material was deposited in places designated in the Federal contract was not submitted by respondents to the Federal Contracting Officer or the Secretary of Army as required. See **U. S. v. J. A. Helpuck Co.**, 328 U.S. 234, 239 (1946). The original contract is sent up with the record and is Defendant's Exhibit No. 3.

[8] No evidence of collusion, fraud or error was submitted to the State Courts, and no issue of fact concerning same was presented by respondent, nevertheless, the Texas Courts reopened the Federal contract and disregarded its provisions.

8. Whether the United States District Court erred in remanding this case to the District Court of the State of Texas when the Federal Court has original and exclusive admiralty jurisdiction of maritime matters and where the claim or right of the servient riparian landowner arose out of a Federal dredging contract and embraces the deposit of dredged material upon a Federal dredging easement and where the rights of the parties arise under the Constitution and laws of the United States,[9] and where an obvious Federal question is involved.

Constitutional Law Involved

Article I, Section 8, Clause 3

> "The Congress shall have Power - - - to regulate Commerce - - - among the several States - - -."

Article I, Section 8, Clause 18

> "The Congress shall have Power - - - to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States or in any Department or Officer thereof."

Article III, Section 2

> "The judicial Power shall extend to all Cases of admiralty and maritime Jurisdiction - - - and to Controversies to which the United States shall be a Party - - -."

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[9] See various River and Harbor Acts quoted in Appendix pages 1-5. Also see **Lester v. G. L. Tarlton Contractor, Inc.**, 45 F. Supp. 994 (D.C. Mo.-1942).

Article IV, Section 1

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

Article IV, Section 3, Clause 2

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting - - - Property belonging to the United States - - -."

Amendment XIV, Section 1

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutes Involved

Title 28, *United States Code*, Section 1441

(a) Except as otherwise expressly provided by Act of Congress any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of United States shall be removable without regard to the citizenship or residence of the parties.

Title 33, *United States Code* - River and Harbor Acts, Generally (See Appendix pages 1-5 for Pertinent Text.)

Power and Authority of Secretary of Army. 33 USC 1.

Unlawful Use of Levee. Dredging Operations. 33 USC 408, 419.

River and Harbor Improvements, Generally. 33 USC 540, 541, 547, 558c, 591.

Prosecution of Dredging Work, 33 USC 621, 622, 629.

Title 46, *United States Code*, Section 740

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to persons or property caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, that as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

Act of March 3, 1925, House Document 238 - 68th Congress, 1st Session; 43 Stat. at Large 1186, authorizing construction of this section of the Intracoastal Canal contingent upon obtaining easements to deposit dredged material.

Civil Functions Appropriation Act, 1952, Public Law 203, 82nd Congress, First Session, Chapter 556 (H.R. 4386), Vol. 1 of 1951 Session, Page 632 of U. S. Congressional and Administrative Service. Appropriation of $192,657,613.00 for maintenance and preservation of rivers and harbors.

Statement of the Case

Petitioner, a Texas corporate dredging contractor, entered into a dredging contract with the United States (Defendant's original exhibit 3) and agreed to dredge the Intracoastal Canal under Federal Government supervision and agreed to deposit dredged material in areas designated by the Corps of Engineers U. S. Army, on land covered by a perpetual easement conveyed to the Federal Government by respondent for the purpose of depositing dredged material thereon. (Defendant's Exhibit 1, a copy of the easement is appended to this petition.) The dredged material was deposited in accordance with the plans and specifications of the Federal Government. See aerial photographs of area, plaintiff's exhibit 1 and 2; a Federal dredging chart, defendant's exhibit 2; and Corps of Engineers, U. S. Army, Certificate of Completion (Defendant's original exhibit 3 page 1) which reads as follows:

Certificate of Completion dated 9/23/52

This is to certify that Bauer-Smith Dredging Co., Inc., P. O. Box BB, Port Lavaca, Texas, Contractor, completed on 15 September 1952, all work under Contract No. DA-41-243-eng.-1392, dated 17 March 1952 for dredging: Gulf Intracoastal Waterway from Port Arthur Canal to High Island in Jefferson, Chambers and Galveston Counties, Texas; that the materials and labor were furnished in accordance with the terms of the specifications and contract; that all payrolls and guarantees have been furnished; *that the work was constructed in accordance with the original specifications and contract drawings as modified by approved change orders, and supplemental agreements;* with the following exceptions: - - - None - - - and it is recommended that the work under this contract be accepted by the contracting officer. Signed by Glen F. Egan, Resident Engineer. (Emphasis Supplied.)

By a deed dated October 3, 1928, the respondent, a Texas riparian landowner, conveyed to the United States, the perpetual right and easement to deposit dredged material upon his land adjoining the Intracoastal Canal and warranted not to use the land in question in such a manner as to "interfere with or abridge the rights and easements conveyed to the United States". The easement was duly recorded in Jefferson County, Texas on August 19, 1929 (Defendant's Exhibit 1). A copy of the easement is appended to this petition, pages 25, 26, 27.

During 1948, Respondent McFadden, the servient riparian landowner, leased the land in question to Respondent Tully who, without checking the recorded Government easement and without receiving permission from the Federal Government to do so, constructed a vast watershed or

fresh water reservoir adjoining the north bank of the Intracoastal Canal, and attached several miles of lead ditches to an 1800 foot drainage canal or borrow ditch indicated on the dredging chart (Defendant's original exhibit 2). Without obtaining permission from the Federal government and in violation of a Federal Statute (33 *USC* 408), respondents utilized about three miles of the Government levee on the Federal right of way along the north edge of the Intracoastal Canal in order to enclose their fresh water reservoir which encroached upon approximately nine square miles of the Federal easement adjoining the north bank of the Intracoastal Canal. By using this area as a fresh water reservoir respondents interfered with and abridged the rights and easements they conveyed to the Federal Government.

The Federal Government dredging chart (Defendant's Exhibit 2) designated as a disposal area the southwest corner of the respondents' reservoir and the area abutting a 1800 foot drainage canal or borrow ditch. Petitioner's hydraulic dredge J. J. MANSFIELD and its floating spill barge deposited dredged materials in the areas designated by the Federal Government, including the southwest corner of respondents' fresh water reservoir. The actual deposit of dredged material is graphically shown on an aerial photograph of the area introduced in evidence by the plaintiff as their Exhibit #1.

No part of the dredge, spill barge or pipe line touched land. The entire dredging operation was carried out upon the navigable waters of the United States. The dredged material was forced from a pipe suspended over the edge of the canal. All dredged material was deposited upon the easement granted to the United States by respondents and in the areas designated by Federal engineers.

When Petitioner's dredge approached the western boundary of respondent's land, Mr. Tully boarded the hydraulic dredge J. J. MANSFIELD and demanded that dredging operations cease and that dredged material be deposited elsewhere than upon the north bank of the Intracoastal Canal, where the Federal Government plans and specifications required the dredged material to be deposited. (See blueprint representing the dredging chart—Defendant's exhibit 2).

The crew of the dredge J. J. MANSFIELD shifted the spill barge to the south bank when it reached respondent's west fence located 700 feet west of an 1800 foot drainage canal or borrow ditch. This discretionary act was performed by petitioner to avoid depositing dredged material in the drainage canal or ditch. There was a notation on the dredging chart "no dredged material shall be allowed to enter this canal", referring to the 1800 foot drainage canal.

The following morning, when the dredge was east of a levee used as a cattle road, the spill barge was shifted back to the north bank in order to deposit dredged material in the spoil area designated by the Federal Government. Neither the fresh water reservoir or the extensive system of irrigation ditches constructed by respondent were shown on the Federal dredging chart and there was no indication on the dredging chart that there were rice fields in the vicinity.

In spite of the plain markings on the Federal dredging chart and on aerial photographs indicating that spoil was deposited in designated disposal areas, the Texas Courts ruled that the spoil was deposited in areas not authorized by the Federal Government. Texas Courts disregarded the findings and decisions of the Federal engineers trained to read and construe dredging charts and contracts. These engineers were selected by the Federal Government to

accurately determine the manner in which dredging operations are performed. Texas Courts ignored the fact that Congress delegated to the Secretary of Army the exclusive power to approve or disapprove of the "manner" in which the dredging contract was performed.

A judgment of $60,631.51 against the dredging contractor was entered by the trial court and affirmed by the Texas Court of Civil Appeals, 305 S.W. 2d 805. The judgment includes $12,500.00 exemplary damage for wilful trespass upon a Federal easement, damage to riparian land covered by a Federal easement, pollution of a water reservoir, which encroached upon and interfered with and abridged the rights conveyed to the Federal Government by respondents. Judgment was also entered for damage to several miles of lateral irrigation ditches, not shown on the dredging chart and not approved by the Secretary of Army, and damage to a booting rice crop which sprouted in unidentified elevated rice fields some seven miles north of the place where dredged material was deposited.

The Federal Government, after inspecting the manner in which the dredged material was deposited upon respondent's land, and with full knowledge of respondents' alleged damage claim, accepted, approved, adopted and ratified the manner in which its agent performed the Federal dredging contract and paid Petitioner in full for the dredging work performed. In spite of this action on the part of the Federal Government, the Courts of the State of Texas, concluded that Petitioner's acts were outside the provisions of the Federal dredging contract, and therefore the United States could not adopt them. Appendix page 48. The Texas Appellate Court stated that the Federal Government was only interested in cleaning out the Intracoastal Canal and not in depositing dredged material on the Federal easement con-

veyed to the United States by respondent in compliance with an Act of Congress. Appendix page 48. Two pages of the Federal contract are devoted to the deposit of dredged material (Defendant's Exhibit No. 3, pages TP-1 and 2). It is common knowledge that the deposit of dredged material is an important factor in determining the cost of dredging.

The dredging contract specifically provides "the work shall be conducted under the general direction of the contracting officer, and shall be subject to inspection by his (contracting officer's) appointed inspectors to insure strict compliance with the terms of the contract". In the event of a dispute concerning the performance of terms of the Federal dredging contract, certain procedural steps are required before a claim can be perfected. The respondents, although relying upon the Federal dredging contract to perfect their claim, failed to comply with the procedural requirements in reference to controversies and claims. A contract provision on Sheet 4 of the Federal contract (Defendant's Exhibit 2), reads as follows:

> "All disputes concerning questions of fact which may arise under this contract and which are not disposed of by mutual agreement, shall be decided by the contracting officer . . . ."

The Texas Courts, reopened the Federal dredging contract, although the Federal contract itself provides that after final acceptance of the dredging work by the Federal Government, the contract will not be reopened "except on evidence of collusion, fraud or obvious error". Page SC-7 of Defendant's Exhibit 3. There being no evidence in the record on these points, no fact issue was presented covering "collusion, fraud or error".

There is no evidence in this case that Petitioner failed to execute the will of the Federal Government or "exceeded the authority" granted to it by the Federal Government. The fact that the Federal Government certified that their Federal agent performed its dredging contract in a satisfactory manner and that the work was accepted by the United States with full knowledge of respondents' complaints, precludes any judicial declaration on the part of the Courts of the State of Texas that Petitioner did not execute the will of Congress. *Yearsley vs. Ross Construction* Co., 309 U.S. 18, 21, (1940).

How Questions Were Raised

Petitioner filed a petition to remove this case to the U. S. District Court for the Eastern Disrict of Texas, Beaumont Division. The respondent-plaintiff below, filed a Motion to Remand. Written briefs in support of and opposed to the the Motion were filed and argued. The District Court ruled that a Federal question was not involved. See Appendix page 52. Questions herein raised were presented at that time.

After the case was remanded, exceptions were filed to plaintiff's pleadings and a Motion for Summary Judgment was filed. This Motion was briefed and argued by both parties. The Trial Court overruled defendant's Motion for Summary Judgment. Questions herein raised were presented to the Trial Court at that time.

After the case was tried and a verdict returned, Petitioner-Defendant filed a Motion for Judgment Non Obstanti Verdicto, which the Trial Court overruled. A motion for New Trial and an Amended Motion for New Trial were overruled. In each instance, questions herein raised were again presented to the Trial Court.

On Appeal to the Court of Civil Appeals, Ninth Judicial District of Texas at Beaumont and upon an Application for Writ of Error to the Supreme Court of Texas and upon a Motion for Rehearing presented to that Court, questions herein raised were presented.

Reasons for Granting Writ

I.

Conflict Between Federal and State Rights In Reference To The Improvement Of Navigable Waters Of The United States

The Commerce Clause, Article I, Section 8, Clause 3, and Article I, Section 8, Clause 18, of the *United States Constitution* validly confers upon Congress the exclusive power and authority over Federal dredging contracts relating to the improvement and maintenance of the navigable waters of the United States, *U. S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). Congress validly conferred upon the Secretary of Army and Corps of Engineers U. S. Army, the exclusive right to contract with dredging contractors and to determine whether their contracts are properly performed (River & Harbor Acts, Title 33, *U. S. Code.* Appendix, pages 1 to 5). State Courts cannot usurp this function. *U. S. v. Lynah*, 188 U.S. 445, 465 (1903). Nevertheless, in the case at bar, the Texas Courts interfered with the power exclusively delegated to Congress by the United States Constitution and disregarded the terms of the Federal dredging contract itself. See disputes clause herein quoted, and *U. S. v. J. A. Holpuck Co.*, 328 U.S. 234, 239 (1946).

In an unprecedented decision by two judges of a three judge court, the Ninth Court of Civil Appeals at Beaumont, Texas declared that a Federal dredging contractor, acting under the supervision and control of the Corps of Engineers U. S. Army, is liable for damages to a servient riparian landowner, who granted an easement to the United States which permits the Petitioner to do the very acts complained about, to wit: deposit dredged material on the land in question. The Texas Courts held the Petitioner liable because dredged material was deposited upon the Federal easement "in places not provided in the Federal dredging contract". Appendix, page 47. This finding was made even though the Federal Government approved and accepted the dredging work performed by their agent prior to the time the lawsuit was filed. See Certificate of Completion quoted on page 10 herein and Defendant's Exhibit 3. In order to sustain their position, the Texas Appellate Courts declared that the Federal Government could not adopt the acts of their agent because the Federal contract was not properly performed. Appendix page 49. The Texas Courts not only misapprehended the force and effect of the Federal Government's acts and the applicable Federal law but also ruled contrary to the truth and right of this case.

The Texas Courts relied upon *Larson v. D & F Commerce Corp.*, 337 U.S. 682, as authority for their ruling.[10] The *Larson* case involved an injunction proceeding instituted in a Federal Court against the president of War Assets Administration. This Court held that a party to a Government contract could not enjoin an officer of the Federal Government if he acted within his "statutory authority". The principles of law expressed by this Court in the *Larson* case actually support the Petitioner's conten-

[10] Appendix page 49.

tions and are in direct conflict with the reasoning of Texas Court. This is true because in the case at bar, Petitioner owed no "duty" to the servient riparian landowner or his assigns and respondents offered no evidence of an "unlawful" or "illegal" act on the part of Petitioner. The *Larson* case requires that a plaintiff must prove an invasion of his "legal rights" and if he fails to allege and prove conduct which is "illegal" he does not have a cause of action against a Federal officer or agent. (337 U.S. at 693).

The landowner in the case at bar was unable to prove an "illegal act" on the part of Petitioner because respondent granted the United States the right to deposit dredged material from the Intracoastal Canal upon his land. Thus, respondent conveyed away any cause of action he or his assigns or lessees had against Petitioner, an agent of the Federal Government. (*Restatement of the Law of Torts*, Section 890). Furthermore, respondent was not a party to the dredging contract entered into between Petitioner and the United States and therefore, neither he nor the Texas Courts could establish a cause of action against a Federal agent after the United States had declared that their dredging contract was properly performed. *Yearsley v. Ross Construction Co.*, 309 U.S. 18. Under the circumstances, there could not be a tortious breach of contract. See *Restatement of the Law of Contracts*, Section 145, and *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952, 955 (D.C. Ala.-1947). According to the *Larson* case (337 U.S. at 693), plaintiff's lawsuit must fail even if the agent acted beyond his authority unless there is proof of "an invasion of a legal right" by a Federal agent. Such proof is totally absent from this case.

II.

This Case Presents Matters Of Far Reaching Public Importance

Countless acres of riparian land along many thousand miles of inland waterways are covered by Federal dredging easements similar to the standard type Federal easement now under consideration. This dredging easement was acquired by the Federal Government to avoid the consequences of the litigation outlined in *U. S. v. Lynah*, 188 U.S. 445 (1902); *Yearsley v. Ross Construction Co.*, 309 U.S. 18 (1940), and related cases, and litigation such as presented by the present lawsuit.

Each session of Congress appropriates large sums of money for the purpose of dredging many miles of navigable inland waterways. This year (1958) Congress appropriated over 1.6 billion dollars for rivers, harbors and canals and flood control projects, and appropriated over 30 million dollars for dredging projects in Texas alone. It is, therefore, of national concern and public importance for this Court to determine whether the Federal dredging easements acquired by the Federal Government to deposit dredged material upon land adjoining navigable streams can be declared a nullity by State Courts in damage suits filed by the grantors of the Federal easements against Federal dredging contractors who satisfactorily perform their dredging contract with United States. If the Federal easements can be avoided by filing damage suits against Federal dredging contractors instead of the United States, as was done in this case, then every Federal contract dredge that hoves in sight will be a bonanza to servient riparian landowners.

To support their decision, the Texas Courts ruled that the so-called wrongful acts of Petitioner did not affect the Federal Government's interest in the dredging operation nor did the Government suffer any harm by them. Appendix page 49. This erroneous statement is challenged because the acts referred to relate to interstate commerce and the improvement of navigable waters of the United States and directly concerns the scope of Federal dredging easements and directly affects the administration of appropriations of Congress and the manner in which Federal dredging contracts are performed, certified, accepted and paid for. If Federal contractors are obligated to carry out their contractual obligations to the satisfaction of the United States and at the same time are held liable for damages to servient riparian landowners who are strangers to the dredging contract, and who grant dredging easements to the United States, then the constitutional functions of the Federal government will be seriously impaired. The United States will not only be required to pay for dredging work performed under a Federal contract, but will also be required to reimburse Federal dredging contractors for damages paid to servient riparian landowners who are not entitled to receive damages in the first instance because they conveyed away their right to complain about dredged mate. l being deposited upon their land when they executed the dredging easement similar to the deed and easement appended to this petition. (Pages 25-27 herein.)

III.

Federal and Texas Decisions Do Not Support The Ruling In This Case

The Texas Appellate Court relies upon the Federal decision of *Converse v. Portsmouth Cotton Oil Refining Corp.*, 281 Fed. 981 (4 CCA-1922), Cert. Den. 260 U.S.

724, to support its ruling. Appendix page 47. The cited case is not in point and is distinguishable on a very important and vital fact, to wit: the dredging contractor in the *Converse* case was required by the Navy dredging contract to provide its own spoil area whereas in the case at bar, the U. S. Army provided spoil areas located on an easement conveyed to the United States by respondents for the purpose of depositing spoil on the land in question. Moreover, in the *Converse* case, the Federal Government was not in charge of the deposit of spoil and in this respect the dredging company was an independent contractor. The Federal Court in the *Converse* case made this clear on page 985:

> "In short, the obtaining of the dumping grounds was a matter with which the Government was not concerned and for which the contractors were required to make arrangements."

In the case at bar, the Petitioner was required to place dredged material in areas designated by the Federal Government and the performance of this part of the contract was controlled by the Corps of Engineers U. S. Army and was completed to the satisfaction of the Federal Government in accordance with Federal plans and specifications. The Federal Government adopted the acts of their dredging contractor as the acts of the United States with full knowledge of the servient landowners complaints.

When the Corps of Engineers U. S. Army accepted the Petitioner's performance of the dredging contract the "will of Congress was carried out" and State Courts cannot as

a matter of Constitutional law challenge the Federal Government's approval of their own dredging contracts. This Court's ruling in the dredging case of *Yearsley v. Ross Construction Co.*, 309 U.S. 18, forbids the States to do so. If the law on this point has not been made clear by this Court, then there is all the more reason why this Writ should be granted to clarify this important question of Federal law.

The decision appealed from is also in conflict with the legal principles stated by the Texas Supreme Court in *House v. Houston Waterworks*, 88 Texas 233, 31 S.W. 179, 181 (1885). This decision holds that a government contractor does not owe a duty to third parties not in privity to a government contract and hence, the contractor cannot be liable to third parties even if the government contract is breached.

The decision in the case at bar runs counter to the established law of agency. See *Restatement of the Law of Agency*, Sections 343 and 345.

> "An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have the agent do it and has authorized the agent to do it."

The Texas Appellate Court having ruled "that the United States itself had the right to dump spoil and dredging material on the lands of McFadden Trust", (Appendix page 47), it follows as a matter of law that the agent has the same privilege, irrespective of the "manner" in which the Federal contract was performed.

IV.

The Question Of Federal and Admiralty Jurisdiction Was Disregarded By The Lower Courts Thereby Depriving Petitioner Of Property Without Due Process Of Law

Exclusive admiralty jurisdiction was conferred upon the Federal Courts by Article III, Section 2, of the *United States Constitution*. In 1948, Congress extended admiralty jurisdiction to include an amphibious case as herein presented (46 *USC* 740). Respondents' claim involves a maritime tort allegedly arising out of a maritime dredging contract. This Court has not heretofore determined the question of whether this type of case involves a Federal question or is within the exclusive admiralty jurisdiction of Federal Courts.

When the State Courts of Texas assumed jurisdiction of this case, they failed to apply the uniform principles of maritime law and procedure to the issues raised and in lieu thereof applied principles and practice of Texas law and procedure. Thus they deprived Petitioner of property without due process of law.

The respondents by filing this lawsuit in a State Court deprived Petitioner of the right to implead the United States and the right to have a Federal Court decide the issue of whether the will of Congress was carried out. The findings of a prejudiced local state jury was substituted for the findings and decisions of a Federal court and Federal engineers placed in charge of the dredging work and charged with the exclusive duty to determine whether the will of Congress was carried out. The decision of the Texas Court is in direct conflict with *Yearsley v. Ross Construction Co.*, 309 U.S. 18, and *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377.

This Writ should be granted in order to decide an important question of Federal law as to whether a servient riparian landowner can prevail in a damage claim against a Federal agent in spite of a dredging easement granting to the United States and its agents the right to deposit dredged material upon his land. Under the present ruling of this case the Federal dredging contractor must seek reimbursement from the Federal government in the U. S. Court of Claims.

If the Court of Claims rules that the Federal Government must reimburse its agent then, by a multiplicity of lawsuits, that which cannot be accomplished by a direct lawsuit against the United States can be indirectly accomplished by suing the agent of the United States. In this manner servient riparian landowners can avoid their legal obligations under the Federal dredging easements they executed and the law of conveyancing is rendered meaningless. The net results will be that Federal appropriations for the development, improvement, and maintenance of the vast waterway system of the United States will be diverted to reimburse dredging contractors who satisfactorily perform their Federal dredging contracts, in order that they might satisfy judgments against them arising out of the deposit of dredged material upon a Federal dredging easement granted to the United States by the damage claimant.

Conclusion

Petitioner accordingly respectfully submits that a Writ of Certiorari should issue to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, Texas.

T. G. SCHIRMEYER
Attorney for Petitioner

DEED AND EASEMENTS (page 1)

(Defendant's Original Exhibit 1)

This deed and covenant, made this 3rd day of October, 1928, between THE McFADDIN TRUST, a Trust created by declaration of trust recorded in Volume 284, Page 33 of the deed records of Jefferson County, Texas, acting by and through W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin, Trustees, parties of the first part, and the UNITED STATES OF AMERICA, party of the second part, witnesseth that:

WHEREAS the said parties of the first part are the owners in fee simple of a certain tract or parcel of land situated in Jefferson County, Texas, and more particularly bounded and described as follows:

(Description omitted. See Def't's Ex. 1.)

AND WHEREAS the party of the second part is carrying on work of constructing, improving and maintaining an Intracoastal Waterway from the Mississippi River at or near New Orleans, La., to Galveston Bay, Texas, in accordance with a project duly authorized by Congress, and the said tract of land is required for canal and right of way purposes in connection with the said work of improvement.

NOW THEREFORE, the said parties of the first part, for and in consideration of the sum of ONE DOLLAR ($1.00) paid by (or on behalf of) the said party of the second part, the receipt of which is hereby acknowledged, have granted, bargained and sold, and do hereby grant, bargain, sell and convey unto the said party of the second part and its assigns, the perpetual right and easement to enter upon, dig or cut away, and remove any or all of the hereinbefore described tract of land as may be required at any time in the prosecution of the aforesaid work of improvement, or any enlargement thereof, and

DEED AND EASEMENTS (page 2)

maintain the portion so cut away and removed as a part of the navigable waters of the United States: and the further perpetual right and easement to enter upon, and use any portion of said tract or parcel of land as herein conveyed, not so cut away and converted into public navigable water as aforesaid, for the deposit of dredged material, and for such other purposes as may be needful in the preservation and maintenance of the said work of improvement; *and the further perpetual right and easement to deposit dredged material during construction and maintenance of the waterway on the land of the parties of the first part adjoining the tract or parcel conveyed.*

RESERVING, HOWEVER, to the parties of the first part, their successors and assigns, all such rights and privileges in said tract or parcel of land as herein conveyed and not converted into public navigable waters as may be used and enjoyed *without interfering with or abridging the rights and easements herein conveyed* to the party of the second part.

TO HAVE AND TO HOLD the said rights and easements unto the party of the second part, the United States of America, and its assigns, for the purpose aforesaid, forever. And the said parties of the first part, for themselves and for their successors and assigns, do hereby covenant with the party of the second part to warrant and defend the title of the same to the said party of the second part, and its assigns, against the lawful claims and demands of all persons, by, through or under the said parties of the first part.

The parties of the first part do hereby waive and release the United States of America, its officers, agents, servants and contractors from any and all claim for damages which

DEED AND EASEMENTS (page 3)

may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner; this waiver and release of damages being intended as a continuing covenant which shall run with the land and be binding upon the parties of the first part and on their successors in ownership of said land.

IN WITNESS WHEREOF, the said trustees of THE McFADDIN TRUST, parties of the first part, have caused these presents to be signed this the 3rd day of October, A. D., 1928.

(Signed) W. P. H. McFADDIN
W. P. H. McFADDIN, JR.
J. L. C. McFADDIN
Trustees

THE STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

On this day personally appeared before me, the undersigned authority, W. P. H. McFaddin, W. P. H. McFaddin, Jr., and J. L. C. McFaddin, to me well known as the Trustees of THE McFADDIN TRUST, whose names are subscribed to the foregoing instrument, and acknowledged to me that they had, in their official capacity, executed the foregoing deed as the act and deed of the said Trust, for the purposes and consideration therein stated and expressed.

Given under my hand and Seal of Office, this the 3rd day of October A. D. 1928.

(Signed) C. A. PAXTON
Notary Public in and for
Jefferson County, Texas

Deed was filed for record on August 19, 1929 in Deed Records of Jefferson County, Texas, Vol. 330, page 152.

FILE COPY

Supreme Court, U.S.
FILED
SEP 4 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 250.

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant Below,

vs.

ROY TULLY ET AL.,
Respondents-Plaintiffs Below.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, NINTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS, ROY TULLY ET AL., IN OPPOSITION.

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September 5, 1958.

E. E. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-8080

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, NINTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS, ROY TULLY ET AL., IN OPPOSITION.

OPINIONS BELOW.

Petitioner removed this case to the United States District Court for the Eastern District of Texas at Beaumont. The United States District Court's opinion dated November 19, 1953, is unreported but is set out in Appendix to Peti-

tioner's Brief, Pages 51, 52. The Court held no Federal question was involved.

Judgment after trial before a jury was entered by the 60th Judicial District Court of Texas against Petitioner-Defendant (Appendix to Petitioner's Brief, Pages 5-25).

This judgment was affirmed by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas. (Appendix to Petitioner's Brief, Pages 25-51) opinion reported in 305 S.W. 2d 805.

Petitioner filed Application for Writ of Error to the Supreme Court of Texas, which was refused on the ground that it presented no reversible error. Petitioner's Motion for Rehearing, which raised the jurisdictional point for the first time on appeal, was overruled on May 14, 1958 (Appendix to Petitioner's Brief, Page 50).

JURISDICTION.

Petitioner contends this Court has jurisdiction under 28 U.S.C. 1257 (3) on the grounds that a Federal dredging contractor is involved (Defendants' Original Exhibit 3).

Respondents would show that the alleged "Federal Question" and question of jurisdiction was not properly raised or presented under Texas Rules of Civil Procedure either in the trial or appellate court.[1]

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[1] "Rule 469 (c), Texas Rules of Civil Procedure, Requisites of Application for Writ of Error, Points of Error. The Points of Error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the Motion for New Trial in the trial court or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the Motion for Rehearing in the Court of Civil Appeals, * * *. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the Motion for Rehearing in said court."

A substantial Federal question must be raised in the correct manner at the proper point under State procedure. *Hulbert* v. *Chicago*, 202 U.S. 275, 26 S.Ct.R. 616. If this is not done the Supreme Court of the United States will decline to exercise jurisdiction. *Pennsylvania Railway Company* v. *Illinois Brick Company*, 297 U.S. 447, 462-3, 56 S.Ct.R. 556. The fact that the Federal question was properly raised before the trial court is not enough. The question must be pursued on appeal to higher state courts, and it must be pursued in the manner specified by the State Rules of Practice. *John* v. *Paullin*, 231 U.S. 583, 585, 34 S.Ct.R. 178. Where a Federal question is initially raised in a petition or assignment of errors filed in the highest state court, which refused to consider any issue not presented to the trial or intermediate appellate court, the jurisdictions of the Supreme Court cannot attach. *Bailey* v. *Anderson*, 326 U.S. 203, 206-7, 66 S.Ct.R. 66. Review is limited to the specific Federal questions which were raised in the state courts. *Whitney* v. *California*, 274 U.S. 357, 362-3, 47 S.Ct.R. 641; *Dewey* v. *Des Moines*, 173 U.S. 193, 197-8, 19 S.Ct.R. 379.

Petitioner-Defendant filed certain exceptions (Petitioner's Appendix, page 34); but the record on appeal did not show any action by the trial court on the exceptions and none was had (Opinion Court of Civil Appeals, Petitioner's Appendix, page 35). No plea to the jurisdiction of the State District Court was filed or presented. The only answer filed by Petitioner-Defendant was a general denial (Appendix this Brief page A1; Transcript page 20); Petitioner-Defendant likewise filed a cross-action against Plaintiffs to recover Five Thousand and no/100 ($5,000.00) Dollars allegedly expended by it to save plaintiffs' rice crop and to mitigate damages (Appendix this Brief, page A2).

Petitioner-Defendant requested Special Issues Nos. 40, 41, 42, 43, 44 and 45 (Petitioner's Appendix, Pages 20-22); the jury in answer to these issues found that Petitioner, Bauer-Smith Dredging Company, Inc., deposited material on July 18, 19 and 20 in a place on the Respondents' property not provided in its Federal contract for deposit of material (Opinion, Court of Civil Appeals, Petitioner's Appendix, Pages 37-38). The jury likewise found that Petitioner-Defendant negligently deposited material, which included spoil and salt water, in Respondents-Plaintiffs' fresh water canal where the plat attached to the Government contract provides: "No material shall be allowed to enter this canal". (Petitioner's Appendix, Page 16). Other findings of negligence are found in the opinion of the Court of Civil Appeals (Petitioner's Appendix, Page 35). The Court of Civil Appeals said: "All such findings are supported by the evidence." (Petitioner's Appendix, Page 37). Again, the Court of Civil Appeals said: "We think the evidence supports the findings of the jury that the Appellant was negligent in the performance of his contract and *exceeded the authority granted* (italics ours) and the directions given in its contract with the Government. It is noted that in none of its Points of Error on appeal does the Appellant complain of the sufficiency of the evidence in any way." (Petitioner's Appendix, Page 48). Again, the Court of Civil Appeals held: "The acts complained of were done in a negligent and willful manner, outside of the provisions and directions in the contract itself." (Petitioner's Appendix, Page 49). The only points of error presented on appeal are set out in the opinion of the Court of Civil Appeals (Appendix to Petitioner's Brief, Pages 39-40). The Supreme Court of Texas is unauthorized to review questions of law not raised in Motion for Rehearing in the Court of Civil Appeals. *Stephenson* v. *Miller-Link Lumber Company*, Commission of Appeals of

Texas, 277 S.W. 1039; *Smith* v. *Brazoria County*, 115 Texas 148, 278 S.W. 177. On Writ of Error to the Court of Civil Appeals, the Supreme Court of Texas has jurisdiction to determine only questions which were properly before the Court of Civil Appeals. *Wisdom* v. *Smith*, 146 Texas 420, 209 S.W. 2d 164. Petitioner-Defendant attempted to assign the error in the Supreme Court: "Second Point—The Authority Granted to the Petitioner by the United States Was Not Exceeded and According to Law Petitioner is Immune from Liability". There is no assignment in the Motion for Rehearing before the Court of Civil Appeals attacking the fact findings of that court and the fact findings of the jury, to the effect that the authority granted to Petitioner in the contract with the United States was exceeded and that Petitioner-Defendant was guilty of negligent acts which were a proximate cause of the damage. In other words, Petitioner-Defendant, although it did not attack the findings of the jury in the Court of Civil Appeals on the sufficiency of the evidence, and thereby could not attack such findings in the Supreme Court of Texas, continues to argue the factual matters found against it by the jury and the Court of Civil Appeals to the effect that the authority granted to the Petitioner-Defendant Federal contractor by the United States was exceeded and that it deposited material which included spoil and salt water in a place on the Respondents' property not provided in its Federal contract.

The Supreme Court of the United States will not review a state court judgment based upon an adequate and independent non-Federal ground, even though a Federal question be involved and perhaps wrongfully decided. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct.R. 33. Where a non-Federal ground is raised in the record which may be found ade-

quate to support it the presumption is that the court decided the case on a non-Federal ground. Jurisdiction will thus be declined. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54-55, 55 S.Ct.R. 16; *Adams* v. *Russell*, 229 U.S. 353, 33 S.Ct.R. 846. Where the Supreme Court of Texas, the highest court of the state, delivered no opinion and it appears that the judgment may have rested on a non-Federal ground, the Supreme Court of the United States will not take jurisdiction to review the judgment. *Stembridge* v. *State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837; *Durley* v. *Mayo*, 351 U.S. 282, 76 S.Ct. 806, 809.

Since this case was tried by a jury in a state court and the findings of the jury were not attacked by the Petitioner-Defendant on the sufficiency of the evidence or without support in the evidence, and the Court of Civil Appeals of Texas found in its opinion that such findings of the jury were supported by the evidence, the Seventh Amendment to the Constitution,[1] prevents the Supreme Court of the United States from retrying the facts. The Supreme Court will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. It is submitted that this Court does not have jurisdiction and that the Petitioner's Application for Writ of Certiorari should be dismissed.

QUESTIONS PRESENTED.

Petitioner asserts there are seven questions presented, but Respondent would show that the only points raised on

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[1]Article VII—Amendment to U. S. Constitution: In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

appeal to the Court of Civil Appeals which are raised here are: First Point, that the trial court erred in failing to recognize defendant's defenses that the plaintiffs had previously given the United States Government the right-of-way and easement to do the very things made the basis of this suit—to dump spoil on the lands of the plaintiffs in the area involved in this suit; Second Point, that the trial court erred when it refused to rule that there could be no recovery from defendant contractor because the acts complained of were legally authorized by the Government to improve navigation and such acts should be regarded as the acts of the Government and not the personal acts of the contractor.

The application for writ of error to the Supreme Court of Texas only asserted the point that where the landowner conveys to the United States a perpetual unrestricted easement to deposit dredged material upon his land, then neither the landowner nor his tenants have a legal right to sue a contractor, dredging a public waterway under the supervision of the United States, for damages resulting from the deposit of dredged material upon land covered by the easement. The second point attempted to be presented to the Supreme Court but not assigned on motion for rehearing was that the authority granted to Petitioner-Contractor by the United States was not exceeded.

In each of the points presented to the Court of Civil Appeals and the Supreme Court of Texas, as well as in the questions presented in the petition for Writ of Certiorari, Petitioner-Defendant refuses to recognize the findings of the jury and the findings of the Court of Civil Appeals that it deposited material in a place on Respondents' property not provided in its Federal contract for deposit of material, that it negligently deposited material, which included spoil and salt water, in Respondents' fresh water

canal where the Government contract provided that no material should be allowed to enter such canal; that Appellant was negligent in the performance of its contract and exceeded the authority granted and the directions given in its contract with the Government. The Court of Civil Appeals expressly held that the acts complained of were done in a negligent and willful manner, outside of the provisions and directions in the contract itself.[1] (Appendix to Petitioner's Brief, Page 48).

In each of the questions presented by Petitioner it is assumed that it did not deposit spoil in places not provided for in its contract with the United States and that it did not exceed the authority granted in such contract.

Question No. 2 in Petitioner's Brief was not raised or presented in the Court of Civil Appeals or the Supreme Court and it seeks to disregard the limitations placed upon the deposit of spoil in its contract with the United States. In regard to the Sixth Point, the question of admiralty jurisdiction and the question of whether the District Court of the United States erred in remanding the case, was not presented to the trial court nor was it assigned as error on appeal to either the Court of Civil Appeals or the Su-

---

[1]The Court of Civil Appeals in its opinion (Appendix to Petitioner's Brief, Page 48) comments:

> "The Appellant here had the right under the easement and his Government contract to dump spoil with impunity on the lands of Appellees, only at such places as his contract directed him to dump it. When it placed spoil at any other place, such act was not the act of the Government but was Appellant's own act, for which it is liable.
>
> "We think the evidence supports the findings of the jury that the Appellant was negligent in the performance of his contract and exceeded [illegible] authority granted and directions given in its contract with the Government. *It is noted that in none of its points of error on appeal does the Appellant complain of the sufficiency of the evidence in any way* * * *." (Italics ours).

preme Court (Appendix to Petitioner's Brief, p. 39; Appendix this Reply, p. A9).

REPLY TO PETITIONER'S STATEMENT AS TO "HOW QUESTIONS WERE RAISED."

Respondents refer to its discussion under "Jurisdiction" and "Questions Presented" of this reply, to show the only points raised by Petitioner on appeal before the Court of Civil Appeals and Texas Supreme Court.

The question of jurisdiction or removal was not assigned on appeal or presented to the State District Court, the Court of Civil Appeals or The Supreme Court of Texas.

Special exceptions were not presented to or ruled on by the trial court (Opinion Court Civil Appeals—Appendix to Petitioner's Brief, Page 35).

Any error in the trial court's ruling on Motion for Summary Judgment that fact issues existed was not assigned on appeal.

RESPONDENTS' COUNTERPOINTS.

1. The jury having found from the evidence that Petitioner-Defendant, Bauer-Smith Dredging Company, deposited material, which included spoil and salt water, on July 18, 19 and 20 in a place on Respondents' property not provided in its Federal contract for deposit of material, and in Respondents' fresh water canal where the plat attached to the contract provides: "No material shall be allowed to enter this canal", and having further found that Petitioner was guilty of acts of negligence which were a proximate cause of the damage, as well as the intentional, willful and deliberate acts of Petitioner's vice-principal.

and the Court of Civil Appeals having found such findings supported by the evidence, the contract with the United States did not present a defense to such action for damages under the law of Texas.

2. Petitioner-Defendant dredging contractor was liable under the law of Texas for damages to Respondents' rice crop, leasehold and freehold proximately caused by the negligence or wrongful acts or omissions and deliberate, willful action and failure to act the same as any other private person; and the contract with the United States provided no defense or immunity to Respondents' action for damages where the dredging contractor exceeded its authority granted in the contract and negligently performed the contract. Further, the Government contract, Section 11, provides that: "Contractor shall * * * be responsible for all damage to persons or property that occur as a result of his own fault or negligence in connection with the prosecution of the work, * * *". (Statement of Facts, Volume 3, the third page following Page 702, Original Def. Ex. 3).

3. Respondents-Plaintiffs' petition stated a cause of action against Petitioner-Defendant based on negligence and willful acts under Texas law, and the Petitioner-Defendant having offered the Government contract in defense to such action under a plea of general denial, the burden was on the defendant to prove that the acts complained of were performed within the authorization of the contract—the findings of the jury and the undisputed evidence that material, including spoil and salt water, was deposited in the fresh water canal where it was expressly provided that no material should be allowed to enter such canal, establish that the acts complained of were outside of the contract and in violation of the rights and privileges granted by the Government to the contractor.

4. Respondents-Plaintiffs were not parties to the contract between the United States and Petitioner-Defendant and were therefore not bound by any settlement procedures therein contained, and to hold that acceptance of the work by the contracting officer of the United States or his subordinate at a time when a claim for damages was being asserted by Respondents-Plaintiffs against the Petitioner-Defendant is a bar to any action against the contractor would deprive Respondents of their Constitutional rights to a trial of the facts by jury, and would deprive Respondents-Plaintiffs of their property without due process of law.

STATEMENT.

This was a suit in the District Court of Texas by Respondents against Petitioner, Bauer-Smith Dredging Company, for damages proximately caused to Respondents' rice crop on or about July 18, 19 and 20, 1952, by negligence and willful, deliberate and malicious acts of Petitioner. All parties were residents of Texas. Trial was to a jury and judgment was entered on the verdict of the jury (Appendix to Petitioner's Brief, pp. 5-24).

Petitioner-Defendant filed a general denial to the action for damages, and sought to recover of Roy Tully and L. W. Tully, the rice farmers, $5,000.00 expended by it in an effort to minimize and mitigate the damages to the rice crop (Appendix to this reply, p. A1; Transcript p. 20).

Claim was made by Respondents against Petitioner for damages on July 21, 1952, by letter which was acknowledged by Petitioner on July 25, 1952 (Statement of Facts 685, 640, 643, 668). Subsequent to this date and before the date of the certificate of completion signed by Glen F.

Egan, resident engineer, not the contracting officer of the United States. Petitioner expended $5,000.00 to mitigate damages to the rice crop. This same resident engineer testified he had gone to the scene of the damage and that if any damage resulted from the deposit of spoil in the lead ditch or canal in violation of the terms of the contract, it was the responsibility of the dredging company, and when they failed to put up dikes or take means to prevent this, the contractor took the risk and had to accept the consequences (Statement of Facts, p. 411).

The contracting officer did not have any notice of the Tully claim against Bauer-Smith being outstanding at the time he approved the final payment, and he testified that he had no jurisdiction to release Bauer-Smith from any damages to property that occurred as a result of their fault, or negligence (Statement of Facts, 586-587; 589).[1]

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[1]Excerpt from testimony of Colonel Lang, the contracting officer (S. F. 586):

"Q. The only thing that you, as the contracting officer, were interested in, on behalf of the U. S. Army Engineers was the clearance of the channel, wasn't it?

A. I would say the thing we were interested in was the performance of the work called for in the plans and specifications, which primarily dealt with the clearance of the channel and the depositing of the material in certain areas.

Q. All right, sir. Now you didn't undertake to release Bauer-Smith Dredging Company from any responsibility for the damages to property that occurred as a result of their fault, or negligence, did you?

A. I would say, that is something that I didn't have any jurisdiction over (S. F. 586-587)

Q. Well, now I believe you said, if I understood you correctly, that you didn't have any notice of this claim outstanding at the time you approved this payment?

A. That is correct.

Q. And then you did not attempt to judge the merits of this claim at that time, did you? You didn't have any notice about it?

A. No, sir.

Q. Sir?

A. I didn't know there was a claim." (S. F. 589).

Upon the trial Petitioner-Defendant offered in defense its contract with the United States, Department of the Army (Defendant's Original Exhibit 3). This contract provided:

> "The contractor shall take such precautions, including the construction of new levees and/or repair or raising of old levees, if deemed necessary to prevent spoil or waste from flowing beyond the limits of the spoil disposal area. * * * If any material shall enter a drainage outlet, it shall be promptly removed by the contractor at his expense. No material shall be allowed to enter any existing slip or small boat basin.
>
> "(d) When the material is deposited in confined areas, all embankments or bulkheads needed for confining or grading the material, with waste weirs, shall be provided and maintained by the contractor, and the cost thereof included in the contract price.
>
> "(f) Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to remove such material and deposit it where directed at his expense.
>
> * * *
>
> "11. Permits and Responsibility for Work. The contractor shall, without additional expense to the Government, obtain all required licenses and permits and *be responsible for all damages to persons or property that occur as a result of his own fault or negligence in connection with the prosecution of the work*, * * *." (S. F. Vol. 3, the 3rd page following page 702; Defendants' Original Exhibit 3).

Certain drawings were made a part of the contract by reference and on Sheet 5, which shows the McFaddin Trust lands, is shown a canal (Respondents' fresh water canal and lead ditch which was a part of Tully's irrigation system), with a notation on the drawing: "No material shall be al-

lowed to enter this canal". There was evidence in the record from District Engineer Egan to the effect that the word "material" included salt water and spoil. It is undisputed that the dredging company permitted salt water and spoil to enter this canal, and there was testimony that the spoil and salt water in the canal extended a distance of a mile from the Intracoastal Canal (S. F. 76).

On July 18, 1952, about 4:30 P. M., Respondent, L. W. Tully, saw that Petitioner's dredge was pumping spoil and salt water into the fresh water canal and immediately notified Captain Ohlhausen of the dredge "Mansfield", the officer in charge, that the dredge was pumping spoil and salt water into his "lead ditch" which contained fresh water and was connected with his fresh water irrigation system. At that time L. W. Tully also informed Captain Ohlhausen that he had a fresh water reservoir adjacent to said lead ditch which was then being used to water his rice crop. Captain Ohlhausen informed the office of Petitioner at Port Lavaca, Texas, of these facts and he was instructed to turn the dredge so as to pump on the South side of the Canal, which was away from the fresh water canal and lead ditch and the fresh water reservoir.

On the morning of Saturday, July 19, 1952, the dredge superintendent, Clovis Duplechan, a vice-principal of Petitioner, gave orders to turn the dredge and pump spoil and salt water directly into the fresh water reservoir; prior to such turning and pumping Duplechan was told that such area within the bounds of the levees was a fresh water reservoir and was being used to water Respondents' rice crop. Nevertheless, with full knowledge that the dredge would be pumping spoil and salt water directly into Respondents' fresh water reservoir, and before the operation had begun, Superintendent Duplechan said that he didn't give a "damn", that he was giving the orders, and directed

the crew to pump the spoil and salt water into the reservoir. The jury found that the action by the superintendent was malicious, intentional and willful and awarded exemplary damages for such action.

The jury in response to special issues found the following: Special Issue 25: That Duplechan with knowledge of the existence of the fresh water reservoir before the dredge started pumping into it, willfully and intentionally ordered the pumping of spoil and salt water in the reservoir; Special Issue No. 28: That the defendant, its agents, servants and employees, were negligent in permitting the spoil and salt water to enter plaintiffs' fresh water canal and such was a proximate cause of the damages sustained by plaintiffs, Special Issue No. 30: That Tully notified defendant's agent, Ohlhausen, on July 18, 1952, of the existence of his fresh water reservoir; Special Issue No. 31: That defendant was negligent in pumping spoil and salt water into plaintiffs' fresh water reservoir after notice of its existence and that such negligence was a proximate cause; Special Issues Nos. 33 and 34: That defendant's superintendent, Duplechan, after being notified of the existence of the reservoir, was negligent in failing to inquire of the United States Army Engineers if it was proper to pump spoil and salt water into said reservoir; Special Issues 36 and 37: That Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water reservoir prior to pumping spoil and salt water into the reservoir on July 19, 1952, and that such act of pumping spoil and salt water was a proximate cause of the damage; Special Issue No. 38: That the defendant, Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water canal and lead ditch prior to per-

mitting spoil and salt water to enter said canal on or about July 18, 1952, and that such act of permitting spoil and salt water to enter said canal was a proximate cause of the damage. The Petitioner-Defendant requested Special Issues Nos. 40, 41, 42, 43, 44 and 45, and in answer thereto the jury found that Bauer-Smith deposited spoil on the North side of the Canal on July 18, 1952, July 19, 1952 and July 20, 1952, in a place not provided in its Federal contract for the deposit of material (See Appendix to Petitioner's Brief, Pages 14 through 22).

In the face of the foregoing findings, Petitioner makes the statement at Page 9 of his application to this Court: "The dredged material was deposited in accordance with the plans and specifications of the Federal Government". Respondents submit that this statement is incorrect. At no time on appeal to the Court of Civil Appeals or the Supreme Court did the Petitioner dredging company challenge the findings of the jury by any assignment of error.

Petitioner offered in evidence the easement granted to the United States by W. P. H. McFaddin, et al., over the objection of Respondents because such defense had not been pleaded (Pages 25 through 27, Petitioner's Application; Statement of Facts, Volume 3, Page 696). The quotation from this exhibit to Petitioner's Brief fails to quote the property description and fails to show the plats attached thereto as original exhibits, but the field notes limit the easement for canal purposes to a width of 300 feet for the purpose of constructing the Intracoastal Canal.

The land for actual construction of the Intracoastal Canal is shown on the plat (Statement of Facts 699); after the construction the remainder reverted to McFaddin Trust subject to the right of the United States to deposit spoil. The express reservation reads:

"Reserving, however, to the parties of the first part, their successors and assigns, all such rights and privileges in said tract or parcel of land as herein conveyed, and not converted into public navigable waters as may be used and enjoyed without interfering with or abridging the rights and easements herein conveyed to the party of the second part."

This referred to the tract or parcel of land therein conveyed and described by field notes and not to the lands adjacent on which the United States had a right to deposit dredged material "in a careful and prudent manner".

The instrument further expressly provides:

"The parties of the first part do hereby waive and release the United States of America, its officers agents, servants, and *contractors from any and all claims for damages which may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner;* * * *." (S.F. 694-697) (Emphasis ours).

The Petitioner in his argument has conveniently overlooked the express terms of the easement which imposes an express duty on contractors to deposit spoil in a careful manner.

In other words, McFaddin *et al.* conveyed a well defined easement to the United States for the construction of the waterway but reserved all such rights and privileges in that part of the tract not converted into public navigable waters as could be used by them without interfering with the rights and easements conveyed to the United States. The United States obligated itself to deposit spoil on the land within the easement conveyed and on the adjoining lands of grantors in a careful manner and Grantors released all claim for damages which may result from careful and prudent maintenance of the waterway.

There was testimony that the lead ditch was filled with spoil and muck for a distance of one mile, and at a distance of one-half mile from the Intracoastal Canal the silt, spoil and muck was 18 inches to 2 feet in depth. The Court of Civil Appeals expressly held that Petitioner contractor exceeded the authority granted and directions given in its contract with the government, and was therefore liable for its acts. (See Note Page 8 of this reply).

The Intracoastal Canal was constructed in 1930 or 1932 and the first general dredging for maintenance was about 1942, and the next time of maintenance dredging was some ten years later in 1952. The United States had an easement for the deposit of spoil on the McFaddin lands on the North side of the Intracoastal Canal adjacent to the fresh water reservoir on T. & N. O. Survey 347 and on the South side of the Canal on Section 4 (Statement of Facts 583 witness, Colonel Lang).

The area engineer, Egan, stated it was well known in the dredging business that where you pumped spoil and salt water out of a dredging pipe the velocity of the water will cause it to flow for a considerable distance, carry silt or fine particles which are suspended in it (Statement of Facts 326). Regarding the performance of the provision of the contract requiring that no material be permitted to enter the canal, Egan, the area engineer, testified that it was the responsibility of the contracting party to keep it out but he had the option of disobeying it if he saw fit and was willing to accept the consequences. Engineer Egan also testified the terminology "material" was placed on the plat under his direction, and when he was talking about dredged material he was talking about the combination of dredged material and carrying water (Statement of Facts 368).

Engineer Egan further testified:

"Q. When you put that remark on that chart was it your intention to keep salt water from getting into that ditch, or were you referring to solids?

A. My intention was to put a provision so that if any damage or undesirable effects occurred to that ditch during dredging operations, that there would be grounds for requiring corrective action (S. F. 409): * * * Of course, where there is a big property loss, we do then have the basis for requiring corrective action." (S. F. 411).

Bauer-Smith took no precautions to keep spoil and salt water out of the "canal" (the fresh water canal and lead ditch) (Statement of Facts 497).

Petitioner continually makes statements in its application which are not supported by the record. For example, on Page 8, the statement is made that: "All dredged material was deposited upon the easement granted to the United States by Respondents and in the area designated by Federal engineers". This statement is not correct and it is sufficient to say that the findings of the jury, which the Court finds were supported by the evidence, are to the contrary. Again, on Page 12, Petitioner makes the statement to the effect that it was a discretionary act to avoid depositing dredged material in the fresh water canal and lead ditch. The Government plat expressly states that "no material shall be allowed to enter this canal". Again, on Page 15, Petitioner makes the statement that there was no evidence that Petitioner "exceeded the authority" granted to it in the contract. This is an irresponsible statement in view of the undisputed evidence that spoil and salt water did enter the canal and lead ditch, where the contract expressly provided that no material was to be deposited there.

The Government was required under its easement to deposit spoil on the limits of the canal right-of-way, as well as on the adjacent lands of Respondents, in a careful and prudent manner. The Government made its contract with the dredging company and provided certain protections to the landowner, and also provided in its contract with the dredging company that the dredging company would be responsible for all damages to persons or property that occurred as a result of their own fault or negligence in connection with the prosecution of the work. Further, the Government contract provided that the contractor should take precautions, including the construction of new levees if deemed necessary to prevent spoil or waste from flowing beyond the limits of the spoil disposal area.

ARGUMENT.

Petitioner asserts that its contract with the United States is a complete defense to any action for damages based upon negligence and based upon the fact that it exceeded the authority granted in its contract with the United States and negligently deposited spoil and salt water in places not provided for in the Government contract. It is undisputed in this record that on July 18, 1952, L. W. Tully saw the defendant's dredge pumping spoil and salt water into the fresh water canal which was in fact connected with his rice reservoir system. The spoil and muck was about 18 inches deep in the canal for about a distance of a mile. Petitioner-Defendant, by the very terms of its contract, was not permitted to "allow any material to enter this canal". Egan, the area engineer, testified it was the responsibility of the contracting party to keep it out but he had the option of disobeying it if he saw fit and was willing to accept the consequences. The con-

tractor took no precautions to keep spoil and salt water out of this canal. The jury, as well as the Court of Civil Appeals, has found these facts, that is, that the Petitioner-Defendant was negligent in the performance of its contract and exceeded the authority granted and the directions given in its contract with the Government.

Where an agent or officer of the Government purporting to act on its behalf exceeds his authority, he is personally responsible. *Yearsley* v. *W. A. Ross Construction Company*, 309 U.S. 18, 60 S.Ct.R. 413, 414; *Converse* v. *Portsmouth Cotton Oil Refining Company*, 218 Fed. 981, 4th Circuit; *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct.R. 1457; *Nakasheff* v. *Continental Insurance Company*, 89 Fed. Supp. 87, U.S. District Court New York 1950.

In *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 687, 689, the Court says:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. * * * On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power."

Again, in the Larson case Justice Frankfurter further reviews cases involving liability of the official or agent based on the commission of a common law tort, and at Pages 717, 718, says:

"While there was some talk in the Lee opinion, as well as in some of the cases which followed that decision, about taking property without compensation, the basis of the action was that the defendants were ordinary tortfeasors, not immunized for their wrongful invasion of the plaintiff's property by the fact that they claimed to have acted on behalf of the Government."

* * *

"In each of these cases this Court sanctioned a suit against an officer of the Government merely because the officer misconceived the facts, or misapplied the legal principles, on which rested the plaintiff's right 'under general law to recover possession of specific property wrongfully withheld'. Land v. Dollar, supra, 330 U.S. at page 736, 67 S.Ct. at page 1011, 91 L.Ed. 1209. Under such circumstances an officer acquires no immunity even though he committed a tort while attempting to discharge what would be his duty if he were correct on his assumption as to the ownership of the property or as to the right to its possession under the legal instruments governing the transaction. * * *"

In *Converse* v. *Portsmouth Cotton Oil Refining Company*, 281 Fed. 981, 4th Circuit, a harbor dredging contract with the United States required the contractor to make arrangements for disposing of the dredged material and provided the contractor should be responsible for any damages which might result from such operations. The contractor contended that the damages were incidental to the performance of the work and therefore no liability resulted. The court pointed out that this rule of consequential damage does not apply where the work can be done without inflicting the injury, and in that case said:

"It follows that they are liable to complainant for the injury found to have been caused by their wrongful acts and cannot claim immunity on the ground that

they were 'doing government work under government directions'. For as respects the matter in dispute—the disposition of dredged material—the 'work' to be done was in reality a private enterprise and the only 'directions' were that defendant should make adequate provisions for retaining the material in the area of deposit, and be answerable to 'property owners and others' for all the consequences of their failure to do so, and to this they expressly agreed. This is not saying that the contract itself gives complainant a right of action, but that it does serve to defeat the claim of non-liability because made with the government. It is only repeating to add that the whole defense in this case rests on the assumption that defendants are not liable for the injury suffered by complainant because they were engaged in the performance of a government contract. That assumption is clearly erroneous, in our judgment, when the injury is at once unnecessary and easily avoidable, and especially when, as here, the contractor has expressly agreed to be responsible for any damage to 'property owners or others' which may result from his operations."

As applied to the instant case, the jury found that Bauer-Smith deposited spoil and salt water in places not provided for in the contract and that it was negligent in the performance of the work. It was provided that no material should be allowed to enter the canal which was Respondents' fresh water canal and lead ditch; the contract provided that the contractor should take the precautions, including the construction of new levees, etc., if deemed necessary to prevent spoil and salt water flowing beyond the limits of the spoil disposal area. Thus, the very provisions of the contract of Petitioner dredging company with the United States served to defeat the claim of non-liability. The contractor must take the contract according to its terms and if it exceeds the authority granted in the contract it cannot hide behind the defense that this is a Gov-

ernment contract. Further, the contract expressly provided that Bauer-Smith would be responsible for all damages to persons or property that occurred as a result of its own fault or negligence in connection with the prosecution of the work. Again, this expresses the intention of the Government that the contractor was to be responsible for its negligent acts and acts outside of those authorized under the contract, and it defeats the claim of non-liability under performance of the contract.

In considering the argument of Petitioner, we call the Court's attention to the recent cases of *Indian Towing Company* v. *United States*, 350 U.S. 61, 100 L.Ed. 48, 78 S.Ct.R. 122; and *Rayonier, Inc.*, v. *United States*, 352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct.R. 374, which hold that the liability of the Federal Government for negligent acts under the Federal Tort Claims Act is not restricted to the liability of a municipal corporation on the basis of a distinction between negligence in a "proprietary capacity" and negligence in a "governmental capacity", but the rule for determining liability of the United States is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred. The Supreme Court was likewise not impressed by the government's argument that the decision might impose a heavy burden on the Federal Treasury, stating:

> "* * * Congress, believing it to be in the best interests of the nation, saw fit to impose liability on the United States in the Tort Claims Act. * * * Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the government, and the resulting burden on each tax-payer is relatively slight. But when the entire burden falls on the injured party it might leave him destitute or grievously harmed."

In *Gulf Refining Company* v. *Walker & Son*, 124 F. 2d 420, 425, 630, 6th Cir., the rule is recognized that immunity under a government contract does not extend to liability for damages which result from the contractor's negligence.

The Supreme Court of Texas recognizes the rule that a contractor is liable to third parties for negligence in the performance of the work. *Glade* v. *Dietert*, Tex. S. Ct. 295 S.W. 2d 642; *City of Amarillo* v. *Gray and Stockton*, Tex. S. C., 310 S.W. 2d 737 (Cases not yet reported in Texas Reports). Likewise a municipal corporation is liable for the negligence of its agents. *City of Amarillo* v. *Gray and Stockton, supra.*

A duty existed at common law running from the defendant contractor to Tully et al. to exercise due care not to injure their leasehold and improvements. In reality the work was a private enterprise for a profit. The responsibility for the performance of the contract according to its terms was assumed by Bauer-Smith; the responsibility for building levees, etc., to retain spoil and salt water was assumed by Bauer-Smith; the contract also provided that Bauer-Smith would be responsible for all damages that occurred as a result of his own fault or negligence in connection with the prosecution of the work.

According to the great weight of authority, a contractor with a public body is not entitled to avail himself of the immunity of the latter from liability for injuries resulting from negligence in the performance of public work. 69 A.L.R. 492; *Thompson* v. *Caldwell*, C.C.A. 4th, 294 Fed. 145 (Ky.); *Wade* v. *Gray*, 104 Miss. 151, 61 So. 168; *Foohey Dredging Company* v. *Mabin*, 118 Ark. 1, 175 S.W. 400, etc.; *Converse* v. *Portsmouth Cotton Oil Refining Corporation*, (C.C.A. 4th) 281 Fed. 981 (cert. denied 260 U.S. 724, 43 S.Ct.R. 13); *United States Use of Carnegie Institute* v. *C. A.*

Riffle Company, 247 Fed. 374, District Ct. W. Dist. Pa. In the latter case a contractor with the United States government was said to be liable to a third person on account of injuries to the latter's building caused by the negligence of the contractor in blasting where the contract provided that the contractor should be "responsible for all damages to persons or property which may occur in connection with the prosecution of the contract".

Recent cases recognizing the rule of liability of a government or municipal contractor for negligent performance are: *Tillotson* v. *F.*, 160 Kan. 81, 159 P. 2d 471; *Gilbert* v. *N. M. C. Company*, 39 N.M. 216, 44 P. 2d 489, holding a paving contractor with the city who negligently broke a water main liable for a fire loss caused by low water pressure; *Bluhm* v. *B. & G.*, 62 Ohio App. 451, 24 N.E. 2d 615, holding that a contractor for a city sewer project could not plead he was performing a governmental function in defense to an action for damages resulting from blasting. The contract with the city provided that defendant assumed liability for damages to persons or property by blasting operations, etc., due to improper, illegal or negligent conduct of the contractor.

Petitioner cites *House* v. *Houston Waterworks Company*, 88 Tex. 233, stating that the duty Respondents-Plaintiffs seek to create cannot be based on the Government contract. This is an unusual case on the facts but a quotation from Page 241 demonstrates that the case recognizes the principle of law asserted by Respondents here.

> "* * * The true question always is, has the defendant committed a breach of duty apart from the contract? If he has committed a breach of the contract, he is liable only to those with whom he has contracted, but if he has committed a breach of duty, he

is not protected by setting up a contract in respect to the same matter with another."

In *Atchley* v. *Tennesee Valley Authority*, 69 Fed. Supp. 952, cited by Petitioner, damages were sought for the destruction of crops as a result of a flood on the Tennessee River, the lands of plaintiff being adjacent to waters impounded by defendant. In this case the Court said that the real complaint was as to the manner in which Government discretion had been exercised and "there is no suggestion in the affidavits of any action on the part of the defendant which could properly be described as willful and wanton".

Petitioner asserts that the Court of Civil Appeals in its opinion held that the United States itself had the right to dump spoil and dredged material on the McFaddin lands involved in this suit, and the right of way easement and grant would therefore be a defense in law to a suit of Respondents-Plaintiffs in a suit against the United States. The government was not a party to this suit, the construction of the easement and grant was not necessary to a decision, and this expression of the Court was nothing more than dictum—which it was not necessary for Respondent to challenge since the judgment was affirmed and no judgment was sought against the United States.

Respondents-Plaintiffs do not agree that this statement of the law as applied to the facts is correct. The proper rule for determining liability of the United States under the Tort Claims Act is whether a private person would be responsible under the law of the state where the acts occurred. *Rayonier, Inc.*, v. *United States*, 352 U.S. 315, 1 L.Ed.2d 354, 77 S.Ct.R. 374; *Indian Towing Company* v. *United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S.Ct.R. 122.

The easement granted to the United States reserved to McFaddin and its assigns the right to possession of the lands

within the field notes of the land conveyed and not converted into public navigable waters, subject to the right of the United States to deposit spoil in a careful and prudent manner, and the McFaddin Trust owned the adjoining lands in fee subject to the right of the United States to deposit spoil or other material in a careful and prudent manner. Respondents-Plaintiffs were therefore legally in rightful and lawful possession of the lands covered by the Tully lease at the time of the occurrences. There is an implied if not an express agreement with the United States that the United States, its agents and contractors, would be liable for damages resulting from a careless or negligent maintenance of the waterway and from deposit of spoil in a manner which was not careful and prudent or which was negligent.

Aside from the express provisions of the easement, the law in Texas is that although the United States (considered as a private citizen) had the dominant estate in part of the land under the easement, the exercise of such right must be done in a careful and prudent manner, reasonably exercised as against the lawful possession of the servient estate. *Shell Petroleum Company* v. *Liberty Gravel and Sand Company*, 128 S.W. 2d 471, Tex. Ct. Civ. App., Bmt.; *Humble Oil and Refining Company* v. *L. & G. Oil Company*, 259 S.W. 2d 933, Ct. Civ. App. error refused no reversible error; *Warren Petroleum Company* v. *Martin*, 153 Tex. 466, 271 S.W. 2d 410. Further, it was necessary for the holder of the dominant estate to plead in defense that he exercised his superior right as against the servient estate with due care. *Southern Pine Lumber Company* v. *Smith*, error refused without merit, Ct. Civ. App. Tex., 183 S.W. 2d 471, 472, and other Texas cases above cited. This, Petitioner-Defendant did not do.

Neither the United States nor its contractor had the arbitrary right to pump spoil and salt water into a fresh water reservoir regardless of consequences where Respondents were rightfully in possession. 41 Tex. Juris. 409, Para. 2, Trespass; 41 Tex. Juris. 413, Para. 6; *Shell Petroleum Corporation* v. *Liberty Gravel and Sand Company, supra.*

The contractor was given whatever rights and privileges he had under the terms of his contract with the United States; he urged this as a defense; that his acts were authorized by the United States. The facts and findings of the jury that Petitioner exceeded the authority granted in this contract; that he was guilty of negligence which proximately caused Respondents' damage; that he willfully and deliberately injured Respondents after notice destroy his only defense that he was authorized by the United States and did these acts pursuant to authority granted by the United States. The United States carefully provided that the contractor would be responsible for damages to property that occur as a result of his own fault or negligence in connection with the prosecution of the work. The Petitioner-Contractor took a short cut, was guilty of negligence and willful acts which proximately caused Respondents' damage.

Even if the contractor were not limited by the terms of his contract, he was required, as was the United States, to exercise the right of entry with due regard to the rights of lessees Tully, who was lawfully in possession and within the limitations of the easement which required deposit of spoil in a careful manner.

At common law in Texas the government contractor was liable for damages resulting from his own fault and resulting from his negligences. The work could have been done without injury to Respondents; the Petitioner-Con-

tractor cannot claim immunity to an action for damages when it is undisputed that the depositing of spoil and salt water in the fresh water canal was not in accordance with the government contract but in express violation thereof. These facts served to defeat the claim of non-liability. *Converse* v. *Portsmouth Cotton Oil and Refining Co.*, 281 Fed. 981 (4th Cir.).

The National Association of River and Harbor Contractors have filed application to intervene, and brief subject to such motion. This motion and brief *Amicus Curiae* assumes compliance by Petitioner-Defendant with all conditions in the contract, and thus seeks with a stroke of the "pen" to destroy the findings of the jury and the Court of Civil Appeals that the dredging company was negligent and exceeded the authority granted by the United States. Spoil and salt water was deposited in places outside of those designated in the contract plans and specifications.

Intervenor states that the United States had the right under the easement to deposit dredged material exactly where Petitioner did deposit it. This was a fact not in issue on the trial as the United States was not a party, but its agents and contracting officers, and resident engineer testified the United States *would not* have deposited spoil and salt water into the reservoir after notice of its existence, but would have deposited it elsewhere. A vice-principal of Bauer-Smith willfully and deliberately ordered the pumping of spoil into the reservoir after notice of its existence and use. Further, the United States placed certain restrictions on the contractor in the plans and specifications.

The River and Harbor contractors further argue that the United States "authorized" the dredging company, its agent, to deposit spoil in the lead ditch, and in the reservoir

where it was deposited. This is not true, and contrary to the findings of the jury which were not challenged. The United States did not authorize the deposit of spoil (material and salt water) in the fresh water canal, but expressly provided "no material shall be allowed to enter this canal." Petitioner-Defendant took no precautions but deliberately permitted spoil and salt water to enter the "Canal".

The liability of Petitioner-Defendant was based upon negligence and deliberate and willful acts—all found by the jury and supported by the evidence. This Brief *Amicus Curiae* adds nothing and should be stricken because of the erroneous statements showing a disregard for the facts as shown by the record.

Another point is that Respondents-Plaintiffs are not parties to the dredging contract between the United States and Bauer-Smith, and therefore would have no cause of action against the United States on the contract, *United States* v. *Blair*, 321 U.S. 730, 64 S.Ct.R. 820, 824. Therefore, Respondent-Plaintiffs, who would have no cause of action on the contract as such, would not be bound as to any settlement procedure under the contract for settlement of disputes. Any certificate of formal acceptance of the work would not be binding upon a third party, *i. e.*, the Respondents. Further, the Contracting Officer had no notice of Respondents' claim and damage and did not purport to pass on the fact questions raised by such claim (Colonel Lang, Statement of Facts, pp. 586-589).

REPLY TO PETITIONER'S REASONS FOR GRANTING THE WRIT AND STATEMENT THAT THE CASE PRESENTS MATTERS OF FAR REACHING PUBLIC IMPORTANCE.

This is a suit for damages based upon negligence and willful acts of the defendant, between two Texas citizens, which was tried before a jury. The Government contractor defended on the basis that it had a Government dredging contract and that its acts were authorized by and were within the instructions given in the contract. This was defensive matter which raised issues of fact and it has been found by the jury, by the Court of Civil Appeals, and has also been demonstrated by the undisputed evidence that the Government contractor exceeded its authority and deposited spoil and salt water in places not provided for in the Federal contract for example, in the fresh water canal where the contract expressly stated: "No material shall be allowed to enter this canal". Under all the authorities, both Federal and the common law of Texas as decided by our Texas Supreme Court, the Respondents-Plaintiffs had a cause of action for damages and they established this before a jury. Petitioner made no attack on the findings of the jury in either the Court of Civil Appeals or the Supreme Court of Texas. The damage was unnecessary and would not have occurred had Petitioner complied with the Federal contract and had not Petitioner's vice-principal willfully and deliberately deposited spoil in the fresh water reservoir after notice of its existence and of the probable consequences of his act. In fact, the jury awarded $12,500.00 exemplary damages and this was affirmed by the Court of Civil Appeals, as well as the Supreme Court of Texas. It is doubted that another such case under the facts as presented here would ever arise. Under the de-

cision of this case and since it was solely a factual case, it does not present a matter of far reaching public importance. Petitioner seeks to concern itself with the fact that the United States may be required to reimburse Federal dredging contractors for damages paid to landowners and their tenants, but in the present case the United States expressly provided and Petitioner agreed to be responsible for any damage resulting from their negligent and willful acts in the performance of the contract. This argument is ruled out in *Rayonier, Inc., v. United States*, 352 U.S. 315. Further, had Petitioner any justiciable claim against the United States because of the claim by Respondents, Tully, *et al.*, for damages, it had expressly agreed in the contract with the United States as to the procedure for settlement. As far as this record is concerned no such claim was presented and had it been presented it would have been without merit because the Government contractor deposited spoil outside of the area provided for in its Government contract, and negligently and willfully inflicted damage on Respondents.

Had Respondents sued the United States based upon the negligence and the willful, deliberate and malicious acts of the contractor, the United States had a right of recovery and indemnity under the very terms of the contract. It was not the United States but the contractor who negligently performed and was liable.

It is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Ewell Strong

EWELL STRONG,
McFaddin Building,
Beaumont, Texas,
Attorney for Respondents.

GEO. A. WELLER AND
MARCUS, WELLER & EVANS,
P. O. Box 350,
Beaumont, Texas,
Of Counsel.

APPENDIX TO RESPONDENTS' BRIEF.

Answer of Defendant, Bauer-Smith Dredging Company, copied from Transcript of Record, pages 20-23:

Now Comes Bauer-Smith Dredging Company, the defendant herein, and for answer to plaintiffs' original petition would respectfully show:

1.

By way of special exceptions, defendant would respectfully show as follows:

(1) Plaintiffs' petition does not state a cause of action at law, and defendant prays that the petition accordingly be dismissed with costs, save and except defendant's counterclaim.

(2) That the United States of America is a necessary and indispensible party and is the real party in interest to this cause of action and the original petition filed by plaintiffs is fatally defective by reason of the nonjoinder of a necessary and indispensible party and the real party in interest and plaintiffs' cause of action should accordingly be dismissed.

(3) That by reason of a perpetual right and easement to discharge dredged material upon plaintiffs' land which is held by the United States of America, the defendant, as a contracting agent for the United States, had, at all times mentioned in plaintiffs' petition, a paramount legal right to deposit dredged material upon the land described in plaintiffs' petition, irrespective of how said land was used and plaintiffs in fact and in law, were trespassing or encroaching upon a perpetual easement held by the United States

and under which defendant performed dredging services described in plaintiffs' petition.

(4) That the defendant, as a government contractor cannot as a matter of law be sued by the plaintiffs.

Of which special exceptions, each being taken separately and apart from each other, defendant prays judgment of the Court, together with costs.

2.

Without waiving the foregoing special exceptions, but still insisting upon same, for further answer herein, if any be necessary, defendant denies each and every, all and singular the allegation in said petition contained and demands strict proof thereof.

3.

As a counterclaim arising out of the transaction or occurrence described in the plaintiffs' petition, defendant avers that upon the instance and request of the lessee of McFaddin's land, described in plaintiffs' petition, the defendant expended the sum of $5,000.00, as near as can be determined at this time, to save plaintiffs' 1952 rice crop and mitigate damages which plaintiffs claimed would result from the dumping of spoil upon the land designated as spoil areas by the United States. That at the time defendant expended said sum of money it was agreed and understood between the parties hereto that the cash expended by defendant would be refunded from the proceeds received from the crop of rice saved, that plaintiffs received the admitted sum of $132,278.46 for the 1952 rice crop which was harvested from the land alleged to be damaged but plaintiffs failed to reimburse the defendant for cash expended for their benefit and in their behalf, although due

demand has been made for repayment of same. That at the time the defendant advanced cash to lessen claimed damage to a rice crop it was unknown to the parties hereto that the United States had a paramount right and perpetual easement to dump dredged material upon the land described in plaintiffs' petition and that by reason of mutual mistake the defendant is entitled to recover all sums of money expended in behalf of and for the benefit of the plaintiffs.

Wherefore, Premises Considered, defendant prays that upon trial hereof it have judgment in its behalf, together with costs, that it go hence without day, and that it have such other and further relief, both special and general, at law and in equity to which it may prove itself justly entitled.

T. G. Schirmeyer,
761 San Jacinto Building,
Houston, Texas,
Attorney for Defendant.

cc:

Marcus & Weller
P. O. Box 350
Beaumont, Texas
Attys. for Plaintiffs

Filed M Sept. 15, 1953, James R. Cooney, Clerk, U. S. Court. By Mary G. Wakefield, Deputy.

Endorsement: C. A. No. 2471. No. 66631. In the United States District Court for the Eastern District Beaumont Division. Roy Tully et al. Plaintiffs v. Bauer-Smith Dredging Company, Defendant. Answer. Filed at 11

o'clock A. M. Nov. 31, 1953. L. R. "Speedy" Blakeman, Clerk, District Clerk of Jefferson Co., Texas, R. E. Carter, Deputy.

Plaintiffs' Reply to Defendant's Cross-Action, copied from Transcript of Record, pages 33-35:

TO THE HONORABLE COURT:

Plaintiffs file this, their answer to the cross-action of defendant, and for answer thereto would show:

1.

Answering Paragraph 3 of the defendant's counter claim the plaintiffs, L. W. Tully and Roy Tully, admit that defendant expended some money to mitigate damages which said plaintiffs told defendant's officer, agents and employees would probably ensue, and say that defendant admitted their responsibility for permitting spoil and salt water in the "lead ditch", and for putting salt water in the fresh water reservoir, but said plaintiffs deny that defendant expended $5,000.00, and deny that they agreed to refund the defendant any sum from the proceeds of said crop.

The plaintiffs, Roy Tully and L. W. Tully, deny that any demand was ever made upon them for any such refund, but say that defendant at all times admitted its liability and responsibility for such damages as accrued, and in fact had agreed to settlement of such claim, but the plaintiffs would not execute the type of release and agreement demanded of plaintiffs.

The plaintiffs and cross-defendants other than L. W. Tully and Roy Tully deny all the allegations of the cross-action, and deny that L. W. Tully or Roy Tully were their agents or were authorized to make any agreement for and on their behalf save and except that said plaintiffs were

informed of the settlement agreement proposed and has assented thereto. They deny that any demand for reimbursement has been made as alleged by cross-plaintiff.

2.

Further answering the last part of Paragraph No. 3; cross-defendants deny that the United States had a paramount right and perpetual easement to dump dredged material in the "lead ditch" and fresh water reservoir of plaintiffs.

3.

Answering the prayer of the cross-action, plaintiffs deny that defendant is entitled to any relief prayed for.

Respectfully submitted,

Geo. A. Weller,
Marcus & Weller,
P. O. Box 350,
Beaumont, Texas.

A copy of the foregoing answer was mailed to Mr. T. G. Schirmeyer, 761 San Jacinto Building, Houston 2, Texas, attorney for defendant and cross-plaintiff, on the 8th day of October, 1953.

Geo. A. Weller,
Of Counsel.

Endorsement. Civil Action No. 2471. No. 66631. Roy Tully et al., Plaintiff, v. Bauer-Smith Dredging Company, Defendant. Plaintiff's Reply to Defendant's Cross-Action (Duplicate). Filed at 11 o'clock A. M. November 30, 1953. L. R. "Speedy" Blakeman, Clerk; District Court of Jefferson Co., Texas. By R. E. Carter, Deputy.

MOTION FOR REHEARING.

Appellant's Motion for Rehearing filed in the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, on October 4, 1957 (only the assignments of error have been copied and the argument omitted):

To The Honorable Court of Civil Appeals:

Now comes Bauer-Smith Dredging Company, Appellant in the above entitled and numbered cause, and respectfully files this, its motion for rehearing herein, and respectfully prays the court, upon consideration hereof, to set aside the judgment affirming this cause rendered on September 19, 1957, and upon rehearing to reverse the erroneous judgment of the trial court; or, in the alternative, that the court reverse the judgment in part and here render such judgment as may be requisite and proper under the pleadings and the evidence, and in support of this motion appellant says:

1.

The court erred in overruling and in refusing to sustain Point One of the appellant, reading as follows: "The trial court erred in failing to recognize the defendant's defense that the plaintiffs had previously given the United States Government the right of way and easement to do the very things made the basis of this suit—to dump spoil on the land of the plaintiffs in the area involved in this suit."

2.

The court erred in overruling and in refusing to sustain Point Two of the appellant, reading as follows: "The

trial court erred when it refused to rule that there can be no recovery from this defendant contractor because the acts complained of were legally authorized by the government to improve navigation and such acts should be regarded as the acts of the government and not the personal acts of the contractor."

3.

The court erred in overruling and in refusing to sustain Point Three of the appellant, reading as follows: "The trial court erred when it failed to recognize that there can be no recovery as a matter of law against a government contractor on the ground that he has abused a discretion given him by the government."

4.

The court erred in overruling and in refusing to sustain Point Four of the appellant, reading as follows: "There can be no recovery for damages to the realty because the plaintiffs who own the land are not seeking damages with respect to the realty, and the plaintiffs who are tenants upon the land and who are seeking such damages have no proper interest herein upon which to predicate such a claim."

5.

The court erred in overruling and in refusing to sustain Point Five of the appellant, reading as follows: "The damages alleged do not constitute a taking of property but were merely consequential for which there can be no recovery."

6.

The court erred in overruling and in refusing to sustain Point Six of the appellant, reading as follows: "The trial

court erred in submitting Special Issues 24, 25 and 26 because the defendant had a right, under the land and under the easement, to deposit spoil where it did and the acts of Duplechan in so doing could create no liability for exemplary or punitive damages."

7.

The opinion of the court is in direct and irreconcilable conflict with the opinion of the Supreme Court of Texas in *Glade* v. *Dietert*, 295 S.W. 2d 642, wherein the Supreme Court held that a contractor was not liable to third parties in doing work for a public body, while in the case at bar this court held exactly the opposite, although *Glade* v. *Dietert* is not cited.

8.

The court erroneously construed the substantive law of Texas by holding in substance that although the right of way easement could constitute a defense in a suit by the appellees against appellant's principal, the United States of America, such a defense is not available to the contractor herein, under the rationale of *Lynn* v. *United States*, (C.A. 5) 110 F. 2d 590.

9.

The court erroneously construed the substantive law of Texas by holding in substance that although the right of way easement could constitute a defense in a suit by the appellees against appellant's principal, the United States of America, such a defense is not available to the contractor herein, under the rationale of *Atchley* v. *Tennessee Valley Authority*, 69 F. Supp. 952.

10.

The court erroneously construed the substantive law of Texas, and of the United States, because here the evidence conclusively showed that the appellant contractor was acting for the government of the United States in prosecuting the work and under the unbroken line of decisions by the Supreme Court of the United States, appellant, as the contractor, is not liable to third parties for injuries sustained while appellant was so engaged; this court, in the case at bar, has held the exact converse, thereby subjecting appellant to liability where none exists under the law.

Excerpt from Petitioner's Application for Writ of Error filed in the Supreme Court of Texas. The points of error relied upon taken from pages 5 and 6 of this brief are:

LIST OF POINTS RELIED ON.

FIRST POINT.

Where a landowner conveys to the United States of America and its assigns, a perpetual *unrestricted easement* to deposit dredged material upon his land, then neither the landowner nor his tenants have a legal right to sue a contractor, dredging a public waterway under the supervision of the United States, for damages resulting from the deposit of dredged material upon land covered by the easement.

SECOND POINT.

The authority granted to the Petitioner by the United States was not exceeded and according to law Petitioner is immune from liability.

THIRD POINT.

Irrespective of the government easement and government immunity, the agents of the United States are not liable for the consequences or damages arising out of the maintenance of navigation improvements.

FOURTH POINT.

Assuming that salt water did reach Tully's so-called lead ditch when he notified the men on the dredge of his ditch on Friday, July 18, 1952, nevertheless, he cannot recover for damages resulting from salt water deposit because he failed to take prompt action to block the uphill flow of salt water in his ditch.

Certified copy furnished by Court of Civil Appeals and filed with this Court.

FILE COPY

Office - Supreme Court, U.S.
FILED
AUG 4 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1958

No. 250

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant below,

versus

ROY TULLY, ET AL., *Respondents-Plaintiffs below*

APPENDIX

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Pertinent Parts of Statutes Involved And River and Harbor Acts

Title 33 USC 1, Regulations by Secretary of Army for Navigation of Water, Generally

> "It shall be the duty of the Secretary of Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property or of operations of United States in channel improvements, covering all matters not specifically delegated by law to some other executive department . . ." August 18, 1894, c. 299, Sec. 4, 28 Stat. 362; June 3, 1902, c. 1079, Secs. 6, 11, 32 Stat. 374; August 8, 1917, c. 49, Sec. 7, 40 Stat. 266.

Title 33 USC 408, Taking Possession of, Use of, or Injury to Harbor or River Improvements

> "It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, . . . or in any manner whatsoever impair the usefulness of any . . . levee . . . or other work built by the United States, . . .; Provided, that the Secretary of the Army may, on the recommendation of the Chief of Engineers, grant permission for temporary occupation or use of any of the aforesaid mentioned public works when in his judgment such occupation or use will not be injurious to the public interest." March 3, 1899, c. 425, Sec. 14, 30 Stat. 1152.

Title 33 USC 419, Regulation by Secretary Governing Transportation and Dumping of Dredgings, Refuse, Etc., Into Navigable Waters, Etc.

"The Secretary of Army is authorized and empowered to prescribe regulations to govern the transportation and dumping into any navigable water or waters adjacent thereto, of dredgings, earth, . . . whenever in his judgment such regulations are required in the interest of navigation. . . ." March 3, 1905, c. 1482, Sec. 4, 33 Stat. 1147

Title 33 USC 540, Investigation and Improvements; Control by Department of the Army; Wildlife Conservation.

Federal investigations and improvements of rivers, harbors, and other waterways shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and the supervision of the Chief of Engineers, except as otherwise specifically provided by Act of Congress, which said investigations and improvements shall include a due regard for wildlife conservation. June 20, 1938, c. 535, Sec. 1, 52 Stat. 802.

Title 33 USC 541, Board of Engineers for Rivers and Harbors; Establishment; Duties and Powers Generally.

"There shall be organized in the office of the Chief of Engineers, United States Army, by detail from time to time from the Corps of Engineers, a board of seven engneer officers, a majority of whom shall be of rank not less than lieutenant colonel, whose duties shall be fixed by the Chief of Engineers, and to whom shall be referred for consideration and recommendation, in addition to any other duties assigned, so far as in the opinion of the Chief of Engineers may be necessary, all reports upon examinations and surveys provided for by Congress, and all projects or changes in projects for works of river and harbor improvements prior to June 12, 1902, or thereafter provided for. . . .". June 13,

1902, c. 1079, Sec. 3, 32 Stat. 372; March 4, 1913, c. 144, Sec. 4, 37 Stat. 826; Feb. 10, 1932, c. 26, 47 Stat. 42; Aug. 2, 1946, c. 753, Title I, Secs. 102, 121, 60 Stat. 814, 822.

Title 33 USC 547, Reports as to Local Benefits of Improvement and Recommendations as to Local Cooperation.—

Every report submitted to Congress in pursuance of any provision of law for a survey, in addition to other information which the Congress has directed shall be given, shall contain a statement of special or local benefit which will accrue to localities affected by such improvement and a statement of general or national benefits, with recommendations as to what local cooperation should be required, if any, on account of such special or local benefit. June 5, 1920, c. 252, Sec.2, 41 Stat. 1010.

Title 33 USC 558c, Rights-of-Way Over United States Land

"The Secretary of the Army is authorized and empowered, under such terms and conditions as are deemed advisable by him, to grant easements for rights-of-way for public roads and streets on and across lands acquired by the United States for river and harbor and flood control improvements including, whenever necessary, the privilege of occupying so much of said lands as may be necessary for the piers, abutments, and other portions of a bridge structure: . . ." June 20, 1938, c. 535, Sec. 10, 52 Stat. 808.

Title 33 USC 591, Condemnation, Purchase and Donation of Land and Materials

". . . And provided further, That the Secretary of the Army is authorized to accept donations of lands or materials required for the maintenance or prosecution of such works (canal improvements)." Apr. 24, 1888, c. 194, 25 Stat. 94.

Title 33 USC 621, By What Methods River and Harbor Work May Be Authorized to be Prosecuted

"Any public work on canals, rivers, and harbors, adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts." Sept. 22, 1922, c. 427, Sec. 10; 42 Stat. 1043.

Title 33 USC 622, Method of Doing Work Generally

"It shall be the duty of the Secretary of the Army to apply the money appropriated for improvements of rivers and harbors, other than surveys, . . . , in carrying on the various works, by contract or otherwise, as may be most economical and advantageous to the Government. And all works of improvement authorized to be prosecuted or completed under contracts may, in the discretion of the Secretary of the Army, be carried on by contract or otherwise, as may be most economical or advantageous to the United States. . . ." Aug. 11, 1888, c. 860, Sec. 3, 25 Stat. 423; July 25, 1912, c. 253, Sec. 1, 37 Stat. 222; Mar. 2, 1919, c. 95, Sec. 3, 40 Stat. 1287.

Title 33 USC 629, Contract for Hire of Dredging Plant

"Whenever it shall become, in the opinion of the Secretary of the Army, necessary or desirable to hire a dredging plant or plants for the performance of any of the public work carried on under his direction the said Secretary may, in his discretion, agree for the same, either in the manner cusomary on March 2, 1907, or on the basis of an equitable reimbursement for deterioration of plant when in use by the Government, and a reasonable percentage of the total cost of the work." Mar. 2, 1907, c. 2509, Sec. 5, 34 Stat. 1119.

JUDGMENT OF TRIAL COURT

No. 66,631

ROY TULLY, ET AL.

v.

BAUER-SMITH DREDGING COMPANY

IN THE 60TH DISTRICT COURT
of Jefferson County, Texas

JUDGMENT

On the 21st day of February, 1956 came on to be heard the above entitled and numbered cause, and came the plaintiffs, Roy Tully, L. W. Tully, Ken Capps, W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and husband, C. E. Ward, Camelia Blanchette McFaddin, Di McFaddin Cordts and husband, E. G. Cordts, and Perry McFaddin Duncan, in person and by their attorneys of record, and came the defendant, Bauer-Smith Dredging Company, a corporation, appearing through their representative and by their attorneys of record, and all parties having announced ready for trial a jury composed of W. E. Bowen and eleven (11) others, being good and true men and women of the country, were duly impaneled and sworn to try the issues in said cause; and the matters of fact and things in controversy were submitted to the court and to the jury and the trial of said cause continued from day to day until March 5, 1956 when the matters of fact and things in controversy were submitted to the jury and the jury on March 6, 1956 in answer to the following issues made the answers which are indicated following each issue, to-wit:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the reasonable and probable yield of rice from the 277 acres of Zenith Rice was decreased as a proximate result of Bauer-Smith Dredging Company, its agents, servants and employees placing salt water and spoil in the fresh water canal and fresh water reservoir of plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES.

If you have answered the foregoing Special Issue No. 1 "Yes", then answer the following:

SPECIAL ISSUE NO. 2

What amount in barrels per acre do you find from a preponderance of the evidence the plaintiffs would in reasonable probability have made in 1952 from the 277 acres of Zenith Rice had it not been for the placing of salt water and spoil in the fresh water canal and reservoir, if you have found that plaintiffs suffered a decrease in the probable yield on said acreage?

Answer by giving the number of barrels per acre, if any.

22.5 barrels per acre.

SPECIAL ISSUE NO. 3

What amount in barrels of rice per acre do you find from a preponderance of the evidence was actually produced by plaintiffs from the 277 acres of Zenith Rice in 1952?

Answer by giving the number of barrels per acre, if any.

ANSWER: 49 barrels per acre.

SPECIAL ISSUE NO. 4

What do you find from a preponderance of the evidence was the reasonable cash market value per barrel of Zenith Rice produced by plaintiffs from the 277 acres in the crop year 1952?

Answer by stating the amount in dollars or dollars and cents per barrel.

ANSWER: $8.00 per barrel.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the reasonable and probable yield of rice from the 248 acres of Blue Bonnet Rice was decreased as a proximate result of Bauer-Smith Dredging Company, its agents, servants and employees placing salt water and spoil in the fresh water canal and fresh water reservoir of plaintiffs?

Answer: "Yes" or "No".

ANSWER: Yes.

If you have answered the foregoing Special Issue No. 5 "Yes", then answer the following:

SPECIAL ISSUE NO. 6

What amount in barrels per acre do you find from a preponderance of the evidence the plaintiffs would in reasonable probability have made in 1952 from the 248 acres of Blue Bonnet Rice had it not been for the placing of salt water and spoil in the fresh water canal and reservoir, if you have found that plaintiffs suffered a decrease in the probable yield on said acreage?

Answer by giving the number of barrels per acre, if any.

ANSWER: 22.6 barrels per acre.

SPECIAL ISSUE NO. 7

What amount in barrels of rice per acre do you find from a preponderance of the evidence was actually produced by plaintiffs from the 248 acres of Blue Bonnet Rice in 1952?

Answer by giving the number of barrels per acre, if any.

ANSWER: 16.6 barrels per acre.

SPECIAL ISSUE NO. 8.

What do you find from a preponderance of the evidence was the reasonable cash market value per barrel of Blue Bonnet Rice produced by plaintiffs from the 248 acres in the crop year 1952?

Answer by stating the amount in dollars or dollars and cents per barrel.

ANSWER: $8.60 per barrel.

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that the reasonable and probable yield of rice from the 252 acres of Century Patna Rice was decreased as a proximate result of Bauer-Smith Dredging Company, its agents, servants and employees placing salt water and spoil in the fresh water canal and fresh water reservoir of plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES.

If you have answered the foregoing Special Issue No. 9 "Yes", then answer the following:

SPECIAL ISSUE NO. 10

What amount in barrels per acre do you find from a preponderance of the evidence the plaintiffs would in reasonable probability have made in 1952 from the 252 acres of Century Patna Rice had it not been for the placing of salt water and spoil in the fresh water canal and reservoir, if you have found that plaintiffs suffered a decrease in the probable yield on said acreage?

Answer by giving the number of barrels per acre, if any.

ANSWER: 22.5 barrels per acre.

SPECIAL ISSUE NO. 11

What amount in barrels of rice per acre do you find from a preponderance of the evidence was actually produced by plaintiffs from the 252 acres of Century Patna Rice in 1952?

Answer by giving the number of barrels per acre, if any.

ANSWER: 17.3 barrels per acre.

SPECIAL ISSUE NO. 12

What do you find from a preponderance of the evidence was the reasonable cash market value per barrel of Century Patna Rice produced by plaintiffs from the 252 acres in the crop year 1952?

Answer by stating the amount in dollars or dollars and cents per barrel.

ANSWER: $8.00 per barrel.

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that the reasonable and probable yield of rice from the 155 acres of Blue Bonnet Rice was decreased as a proximate result of Bauer-Smith Dredging Company, its agents, servants and employees placing salt water and spoil in the fresh water canal and fresh water reservoir of plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES.

If you have answered the foregoing Special Issue No. 13 "Yes", then answer the following:

SPECIAL ISSUE NO 14

What amount in barrels per acre do you find from a preponderance of the evidence the plaintiffs would in reasonable probability have made in 1952 from the 155 acres of Blue Bonnet Rice had it not been for the placing of salt water and spoil in the fresh water canal and reservoir, if you have found that plaintiffs suffered a decrease in the probable yield on said acreage?

Answer by giving the number of barrels per acre, if any.

ANSWER: 23 barrels per acre.

SPECIAL ISSUE NO. 15.

What amount in barrels of rice per acre do you find from a preponderance of the evidence was actually produced by plaintiffs from the 155 acres of Blue Bonnet Rice in 1952?

Answer by giving the number of barrels per acre, if any.

ANSWER: 14.8 barrels per acre.

SPECIAL ISSUE NO. 16

What do you find from a preponderance of the evidence was the reasonable cash market value per barrel of Blue Bonnet Rice produced by plaintiffs from the 155 acres in the crop year 1952?

Answer by stating the amount in dollars or dollars and cents per barrel.

ANSWER: $8.60 per barrel.

SPECIAL ISSUE NO. 17

What do you find from a preponderance of the evidence was the reasonable cost in Jefferson County, Texas during the crop year 1952 per barrel of cutting, harvesting, and hauling rice during the harvesting season of 1952?

Answer by stating the amount per barrel.

ANSWER: 90¢ per barrel.

SPECIAL ISSUE NO 18

Do you find from a preponderance of the evidence that the lead ditch and fresh water canal of L. W. Tully and Roy Tully was damaged as a proximate result of the defendant, Bauer-Smith Dredging Company, its agents, servants and employees, permitting spoil and salt water to enter said canal?

Answer: "Yes" or "No".

ANSWER: YES.

If you have answered the foregoing Special Issue No. 18 "Yes", and only in that event, then answer the following:

SPECIAL ISSUE NO. 19

What do you find from a preponderance of the evidence to be the sum of money, if any, if paid now in cash, would fairly and reasonably compensate the plaintiffs for the injury and physical damage, if any, to the lead ditch and canal, caused by the defendant, its agents, servants and employees?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $1,450.00.

In arriving at the amount of money, if any, as above inquired about, you may take into consideration and consider only such, if any, of the following items in paragraph (a) and (b), inclusive, as have been established by a preponderance of the evidence to have been proximately caused by the defendant, its agents, servants and employees:

(a) The reasonable cost of removing the spoil from said canal and lead ditch.

(b) The reasonable cost of erecting and removing the dam across said canal and ditch.

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that the fresh water reservoir of L. W. Tully and Roy Tully was damaged as a proximate result of the defendant, Bauer-Smith Dredging Company, its agents, servants and employees, pumping spoil and salt water directly into said reservoir?

Answer: "Yes" or "No".

ANSWER: YES.

If you have answered the foregoing Special Issue No. 20 "Yes", and only in that event, then answer the following:

SPECIAL ISSUE NO. 21

What do you find from a preponderance of the evidence to be the sum of money, if any, if paid now in cash, would fairly and reasonably compensate the plaintiffs for the injury and physical damage, if any, to the fresh water reservoir, caused by the defendant, its agents, servants and employees?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $8,000.00

In arriving at the amount of money, if any, as above inquired about, you may take into consideration and consider only such, if any, of the following items in paragraph (a) as have been established by a preponderance of the evidence to have been proximately caused by the defendant, its agents, servants and employees:

(a) The reasonable cost of removing the spoil from the reservoir.

SPECIAL ISSUE NO. 22

Do you find from a preponderance of the evidence that the plaintiffs, Roy Tully and L. W. Tully, incurred additional expense in the operation of their irrigation system in 1952 in watering said rice crop as a proximate result of defendant, Bauer-Smith Dredging Company, its agents, servants and employees, permitting spoil and salt water in the lead ditch and reservoir.

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 23

What do you find from a preponderance of the evidence to be the reasonable and necessary cost in Jefferson County, Texas of additional expenses, if any you have found, incurred by L. W. Tully and Roy Tully in the operation of their irrigation system in 1952 in watering said rice crop as a proximate result of the acts of Bauer-Smith Dredging Company, its agents, servants and employees, permitting spoil and salt water in the lead ditch and pumping spoil and salt water in the reservoir?

Answer by giving the amount, if any, in dollars and cents.

ANSWER: $1,250.00

SPECIAL ISSUE NO. 24

Do you find from a preponderance of the evidence that defendant's superintendent, Clovis Duplechan, knew of the existence of the fresh water reservoir before the dredge started pumping spoil and salt water directly into said reservoir?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue No. 24 "Yes", then answer the following issue:

SPECIAL ISSUE NO. 25

Do you find from a preponderance of the evidence that defendant's superintendent, Clovis Duplechan, with knowledge of the existence of the fresh water reservoir, if you have found that he knew of the existence of the fresh

water reservoir before the dredge started pumping into said reservoir, willfully and intentionally ordered the pumping of spoil and salt water into said reservoir?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer the following:

SPECIAL ISSUE NO. 26

What do you find from a preponderance of the evidence to be the sum of money, if any, which should be awarded to plaintiffs as exemplary or punitive damages, if any, for the willful and intentional act of defendant's superintendent, Clovis Duplechan, in ordering the pumping of spoil and salt water in plaintiffs' reservoir, if you have so found that such act was willful and intentional?

Answer by stating the amount, if any, in dollars and cents.

ANSWER: $12,500.00

You are instructed in answering the foregoing issue you will not include any amount of actual damages, if any, proximately resulting from such act, such as damage to crops, if any, damage to the physical properties, if any, extra expenses, if any, but the amount shall be limited to exemplary or punitive damages, if any.

"Exemplary or punitive damages", as used herein, means such sum of money, if any, as in your judgment shall be awarded solely as a punishment for intentional or willful wrong inflicted, if any you have found, and must not include indignities suffered, if any, and outraged feelings,

if any, actual damages, if any, such as damage to crops, if any, damage to physical properties, if any, and must be reasonably proportioned to the actual damages, if any, sustained by Plaintiffs.

SPECIAL ISSUE NO. 27

Do you find from a preponderance of the evidence that the word "material" as used on the plans which provide: "No material shall be allowed to enter this canal" included spoil and salt water?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 28

Do you find from a preponderance of the evidence that the defendant, its agents, servants and employees, were negligent in permitting spoil and salt water to enter plaintiffs' fresh water canal?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer the following:

SPECIAL ISSUE NO. 29

Do you find from a preponderance of the evidence that the negligence of defendant, its agents, servants and employees, in permitting spoil and salt water to enter plaintiffs' fresh water canal, if you have so found, was a proximate cause of the damages, if any, sustained by plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 30

Do you find from a preponderance of the evidence that the plaintiff, L. W. Tully, notified the defendant's agent, W. H. Oldhausen, on July 18, 1952, of the existence of his fresh water reservoir?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer the following:

SPECIAL ISSUE NO. 31

Do you find from a preponderance of the evidence that the defendant, Bauer-Smith Dredging Company, acting through its agents, servants and employees, was negligent in pumping spoil and salt water into plaintiffs' fresh water reservoir after notice of the existence of said reservoir, if you have so found that the defendant's agents, servants and employees had such notice?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer the following:

SPECIAL ISSUE NO. 32

Do you find from a preponderance of the evidence that the negligence of defendant, its agents, servants and employees, in pumping spoil and salt water into the reservoir after notice of its existence, if you have so found, was a proximate cause of the damages, if any, sustained by plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered Special Issue No. 24 "Yes", then answer the following:

SPECIAL ISSUE NO. 33

Do you find from a preponderance of the evidence that the defendant's superintendent, Clovis Duplechan, after being notified of the existence of the reservoir prior to pumping spoil and salt water therein, if you have so found, failed to inquire of the U. S. Army Engineers if it was proper to pump spoil and salt water into plaintiffs' fresh water reservoir?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue No. 33 "Yes", then answer the following:

SPECIAL ISSUE NO. 34

Do you find from a preponderance of the evidence that the failure of defendant's superintendent, Clovis Duplechan, to inquire of the U. S. Army Engineers if it was proper to pump spoil and salt water into plaintiffs' fresh water reservoir, if you have so found, was negligence?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer the following:

SPECIAL ISSUE NO. 35

Do you find from a preponderance of the evidence that the negligence of Clovis Duplecham in failing to inquire of the U. S. Army Engineers if it was proper to pump spoil and salt water into plaintiffs' fresh water reservoir, if you have so found, was a proximate cause of the damages, if any, sustained by plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 36

Do you find from a preponderance of the evidence that the defendant, Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water reservoir prior to pumping spoil and salt water into said reservoir on or about July 19, 1952?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue No. 36 "Yes", then answer this:

SPECIAL ISSUE NO. 37

Do you find from a preponderance of the evidence that the act of Bauer-Smith Dredging Company, or its agents, in pumping spoil and salt water into Plaintiffs' fresh water reservoir after they knew or in the exercise of ordinary care should have known of the existence of said reservoir, if you have so found, was a proximate cause of the damages, if any, sustained by Plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 38

Do you find from a preponderance of the evidence that the Defendant, Bauer-Smith Dredging Company, or its agents, knew or in the exercise of ordinary care should have known of the existence of Plaintiffs' fresh water canal and lead ditch prior to permitting spoil and salt water to enter said canal on or about July 18, 1952?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the foregoing Special Issue "Yes", then answer this:

SPECIAL ISSUE NO. 39

Do you find from a preponderance of the evidence that the act of Bauer-Smith Dredging Company, or its agents, in permitting spoil and salt water to enter Plaintiffs' canal and lead ditch, after they knew or in the exercise of ordinary care should have known of the existence of said canal and lead ditch, if you have so found, was a proximate cause of the damages, if any, sustained by Plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 40

Do you find from a preponderance of the evidence that the Bauer-Smith Dredging Company deposited material taken from the Intracoastal Canal on Friday, July 18, 1952, in a place on the north side of the canal not provided in its Federal contract for the deposit of material?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the preceding Special Issue "Yes", and only in that event, then answer the following:

SPECIAL ISSUE NO. 41

Do you find from a preponderance of the evidence that such act in depositing material contributed in any degree to the damages, if any, sustained by the plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 42

Do you find from a preponderance of the evidence that the Bauer-Smith Dredging Company deposited material taken from the Intracoastal Canal on Saturday, July 19, 1952, in a place on the north side of the canal not provided in its Federal contract for the deposit of material?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the preceding Special Issue "Yes", and only in that event, then answer this issue:

SPECIAL ISSUE NO. 43

Do you find from a preponderance of the evidence that such act in depositing material contributed in any degree to the damages, if any, sustained by the Plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

SPECIAL ISSUE NO. 44

Do you find from a preponderance of the evidence that the Bauer-Smith Dredging Company deposited material taken from the Intracoastal Canal on Sunday, July 20, 1952, in a place on the north side of the Canal not provided in its Federal contract for the deposit of material?

Answer: "Yes" or "No".

ANSWER: YES

If you have answered the preceding Special Issue "Yes", and only in that event, then answer the following:

SPECIAL ISSUE NO. 45

Do you find from a preponderance of the evidence that such act in depositing material contributed in any degree to the damages, if any, sustained by the plaintiffs?

Answer: "Yes" or "No".

ANSWER: YES

It appearing to the court that from the answers of the jury to the issues submitted to said jury, that the plaintiffs, Roy Tully and L. W. Tully, are entitled to recover damages aggregating the sum of THIRTY-SEVEN THOUSAND EIGHT HUNDRED NINETY AND 91/100 ($37,890.91) DOLLARS; that the plaintiff, Ken Capps, is entitled to recover damages in the amount of FOUR THOUSAND EIGHT HUNDRED NINETY-THREE AND 35/100 ($4,893.35) DOLLARS: that the plaintiffs, W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and husband, C. E. Ward, Camelia Blanchette McFaddin, Di McFaddin Cordts and husband, E. G. Cordts, and Perry McFaddin Duncan, are entitled to recover the sum of FIVE THOUSAND THREE HUNDRED FORTY-SEVEN AND 33/100 ($5,347.33) DOLLARS; and that all of the plaintiffs herein are entitled to recover exemplary damages in the total sum of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS which shall be apportioned to the plaintiffs in the proportion that their respective recovery bears to the total amount of the actual damages:

It is therefore ORDERED, ADJUDGED and DECREED by the court that the plaintiffs, Roy Tully and L. W. Tully, recover of and from the defendant, Bauer-Smith Dredging Company, the sum of THIRTY-SEVEN

THOUSAND EIGHT HUNDRED NINETY AND 91/100 ($37,890.91) DOLLARS, together with costs of court, together with interest thereon from date of this judgment until paid at the legal rate of six (6%) per cent per annum.

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiff, Ken Capps, do have and recover of and from the defendant, Bauer-Smith Dredging Company, the sum of FOUR THOUSAND EIGHT HUNDRED NINETY-THREE AND 35/100 ($4,893.35) DOLLARS, together with costs of suit, together with interest thereon from date of this judgment until paid at the legal rate of six (6%) per cent per annum.

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiffs, W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and husband, C. E. Ward, Camelia Blanchette McFaddin, Di McFaddin Cordts and husband, E. G. Cordts, and Perry McFaddin Duncan, do have and recover of and from the defendant, Bauer-Smith Dredging Company, the sum of FIVE THOUSAND THREE HUNDRED FORTY-SEVEN AND 33/100 ($5,347.33) DOLLARS, together with costs of court, together with interest thereon from date of this judgment until paid at the legal rate of six (6%) per cent per annum.

It is further ORDERED, ADJUDGED and DECREED by the court that each and all of the plaintiffs, Roy Tully, L. W. Tully, Ken Capps, W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and husband, C. E. Ward, Camelia Blanchette McFaddin, Di McFaddin Cordts and husband, E. G. Cordts, and Perry McFaddin Duncan

do have and recover of and from the defendant, Bauer-Smith Dredging Company, the sum of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS, together with costs of court, together with interest thereon from date of this judgment until paid at the legal rate of six (6%) per cent per annum, and that said sum of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS which represents exemplary damages shall be apportioned among the plaintiffs in the proportion to their respective recoveries of actual damages to the total amount of actual damages involved in this suit. It is the intention of this decree that each and all of the plaintiffs shall share in the award of exemplary damages on a proportionate basis according to their respective interest in such recovery.

It is further ORDERED, ADJUDGED and DECREED by the court that the plaintiffs and each of them may have their writs of execution, garnishment and such other writs and processes as may be necessary for the proper enforcement of said judgment.

RENDERED and entered this the 19th day of March, A. D. 1956.

MELVIN COMBS

Judge Presiding.

THE FORM OF SUBJECT JUDGMENT IS APPROVED AS TO FORM.

HUGH FRELAND

Attorney for Defendant

Opinion of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas

No. 6068

BAUER-SMITH DREDGING COMPANY, Appellant

ROY TULLEY, ET AL., Appellees

Filed, Sep. 19, 1957

The appellant, Bauer-Smith Dredging Company, brings this appeal from a judgment against it in the District Court of Jefferson County for the sum of $60,631.59 in favor of the appellees, Roy Tully, L. W. Tully, Ken Capps, W. P. H. McFaddin, Jr., J. L. C. McFaddin, Mamie McFaddin Ward and her husband, C. E. Ward, Camelia Blanchette McFaddin, a feme sole, DiVernon McFaddin Cordts and husband, C. G. Cordts and Perry McFaddin Duncan.

The appellees alleged as follows in their petition. In January, 1948, the McFaddin Trust leased to Roy Tully and L. W. Tully a tract of land, a part of the McFaddin Ranch in Jefferson County, described in the petition; such lease was for a period of 10 years and was for the purpose of cultivating rice. The Tullys agreed in the lease contract to construct on the land a reservoir for the purpose of impounding fresh water, and were given the right to construct canals and laterals necessary to water the rice land from such reservoir. Payment for such lease was a portion of the rice harvested from the property. The appellees named, other than Roy Tully, L. W. Tully and Ken Capps, are successors to the rights of the McFaddin Trust under said lease and as such were entitled to the rentals under the terms of said lease. The Tullys planted 777 acres in rice and cultivated the crop themselves and appellee Ken Capps planted and cultivated 155 acres of such land on a 50-50 share basis with the Tullys.

On or about March 17, 1952 the United States of America, Department of the Army, entered into a contract with Bauer-Smith Dredging Company, Incorporated, to perform certain dredging work on the Gulf Intracoastal Water Ways from Port Arthur Canal to High Island in Jefferson, Chambers and Galveston Counties, Texas. The petition copied parts of such contract, including technical provisions for the disposal by the dredging contractor of excavated material. Certain drawings or blue prints in such contract are made a part hereof by reference. On each of said contract drawings is found the following:

"Note: See Paragraph TP-3 (Disposal of Excavated Material) of Specifications for Requirements Relative to Disposition of Soil." On Sheet No. 5 which reflects the McFaddin Trust lands is shown a canal with notation on the drawing: "No Material shall be allowed to enter this Canal." This canal is later in the petition referred to as plaintiffs' "lead ditch".

On or about the 18th day of July, 1952, the Bauer-Smith Dredging Company acting by and through its agents, servants and employees operating the Bauer-Smith dredge "J. J. Mansfield" or some other dredge owned and operated by defendant were engaged in pumping spoil containing salt water on the north side of the intracoastal canal on the W. L. Gallier Survey (a part of Pipkin's Ranch) to the west of the McFaddin Trust lands, and such spoil containing salt water was negligently permitted by defendant's agents, servants and employees to drain into a fresh water canal and lead ditch constructed by the plaintiffs, Roy Tully and L. W. Tully, in connection with their rice cultivation on said leased lands. The natural drainage at such point is to the east and such fact was well known

to the defendant, its agents, servants and employees or in the exercise of ordinary care should have been known to the defendant, its agents, servants and employees. In addition to such facts the drawings which were a part of the appellant's contract hereinbefore referred to expressly provided that no material should be permitted to enter said canal, but nevertheless the appellant, its agents, servants and employees failed to take the necessary precautions and to exercise reasonable care to prevent spoils and salt water from entering said canal.

On July 18, 1952 about 4:30 p.m. L. W. Tully saw that defendant was pumping said spoils and salt water into said lead ditch, and immediately went to said dredge and talked with Leverman Sidney Bronett, one of the appellant's employees, who called Captain W. H. Ohlhausen, who was the captain of said dredge. At that time Tully told Captain W. H. Ohlhausen, appellant's agent, servant and employee, that he was pumping salt water into his lead ditch which contained fresh water and was connected with his fresh water rice irrigation system. L. W. Tully, at said time also told Captain W. H. Ohlhausen that he had a fresh water reservoir adjacent to said lead ditch which contained fresh water and was then being used to water appellees' rice crop. Captain W. H. Ohlhausen then called the office of appellant by radio telephone where he contacted an official of appellant, a Mr. Smith. The agents, servants and employees of appellant were then instructed by their superior in its office to pump to the south side of the intracoastal canal.

On Saturday morning, the 19th day of July, 1952, the appellant's agents, servants and employees operating its dredge began pumping spoil and salt water directly into

appellees' fresh water reservoir which was constructed adjacent to the east of the lead ditch, and adjacent to the canal bank on the south. At the time it began pumping salt water into the fresh water reservoir its employees were acting under the supervision and control of Superintendent Clovis Duplechan. Prior to the time its dredge started pumping into said fresh water reservoir on Saturday morning, July 19, 1952, appellant's agent and employee, Superintendent Clovis Duplechan, was told that such area within the bounds of the levees was a fresh water reservoir and was being used to water Tully's rice crop. Nevertheless with full knowledge that the dredge would be pumping spoil and salt water directly into the fresh water reservoir, and before such operation had begun, the appellant's agent Clovis Duplechan said that he did not care, that he was giving the orders, and his orders to the crew on the dredge were to pump said spoil and salt water into said reservoir. Such action by appellant, its agents, servants and employees was malicious, intentional and willful and the defendant was guilty of gross negligence in deliberately contaminating said fresh water reservoir with salt water. As a direct result of such trespass by, the acts of appellant, its agents, servants and employees in putting salt water and spoil in the lead ditch and fresh water reservoir appellees suffered the damages alleged.

Appellees' water system is constructed and connected together in such manner that when the lead ditch was contaminated with salt water of a high salt content that it was impossible to water the 932 acres of rice because the salt water would have been drawn by the pumps into his rice and would have contaminated and injured the rice crop. As a result of the spoil and salt water in the lead ditch, ap-

pellees could not move water from the fresh water reservoir without getting the salt water in the lead ditch on their crop, and as a direct result of such trespass they could not water their rice crop for a full period of eleven days at a time when said rice was booting and at a time when said rice crop needed water and should have been watered.

The crop of Zenith rice on the 277 acres was watered first, the 252 acre tract second, the 248 acre tract third and the 155 acre tract last and it was some fifteen to twenty-five days before all of the rice was completely watered.

Appellant recognized its responsibility for said trespass and authorized Tully to secure the services of a dragline and to place a temporary levee across the lead ditch in order to block off the salt water in said ditch from the remainder of the water system, and to send the bill to the appellant. Said dam was constructed on or about July 28, 1952 and the first water was pumped on the rice from the reservoir on July 29, 1952. At said time the water flowing on the rice from the reservoir contained from 42 to 64 grains of salt per gallon of water. The water in said reservoir also contained salt as a result of said trespass.

As a result of such intentional and willful trespass in watering the rice crop, the salt content in the water caused yield per acre to be considerably reduced. The petition then alleges in detail the amount of rice produced on the various tracts and the price received per barrel of such yield. It also alleged the reduced yield of 3 barrels per acre on one tract and 3.4 barrels per acre on another tract; 4.7 barrels per acre on another and 7.2 barrels per acre on the 155 acre tract. It alleged a net damage for decrease in yield of rice in the amount of $33,414.40, apportioned among the various appellees.

The petition also alleged additional costs incurred by Roy Tully and L. W. Tully in an effort to mitigate damages and save their rice crop. These items included extra pumping of water 49 days at a cost of $50 per day; dragline work in building a dam across the lead ditch at a cost of $100.

The lead ditch was filled with spoil and muck for a distance of one mile, and at a distance of one-half mile from the canal the silt, spoil and muck was two and one-half to three feet in depth. Silt, spoil and muck was pumped into the fresh water reservoir and the reasonable cost of removing it from the lead ditch, canal and fresh water reservoir in order to place the lead ditch and reservoir in the same condition as before the trespass would be the sum of $8,000.

Because of salt water in the reservoir extra pumping for a period of 40 days in all reasonable probability be required at a cost of $50 per day. Other such special damages to the rice crop total $13,100.

It was further alleged that said acts were committed with full knowledge that said reservoir was a fresh water reservoir and was being used to water a rice crop, and was done under the direction of one Duplechan, Superintendent and Vice Principal of the appellant. Said act was done maliciously, intentionally and willfully and with intent to injure the crop and appellees are entitled to recover exemplary damages in the sum of $25,000.

Pleading alternatively, appellees alleged that if it should be determined that all or any part of their damages was not the result of a trespass on the land, leasehold and appurtenances of the appellees, then it is alleged that the

agents, servants and employees of the appellant Bauer-Smith Dredging Company knew or in the exercise of reasonable and ordinary care should have known that the terrain and drainage of the Gallier tract adjacent to the McFaddin Trust property was in the direction of the fresh water canal located on appellees' property and leasehold, and they were notified on the plats and specifications under which they were operating not to pump or allow salt water and spoil to get into such canal or lead ditch, but the appellant nevertheless, in violation of the terms of such contract and in disregard of the notice therein given, negligently pumped and allowed salt water, spoil and silt to get into said fresh water canal. The appellant, its agents, servants and employees knew or in the exercise of ordinary care should have known that such fresh water canal was connected with appellees' irrigation system and if salt water was pumped into said canal and lead ditch said rice crop would be damaged. Still pleading in the alternative, it was alleged that if L. W. Tully did not tell the appellant, its agents, servants and employees that the enclosure within the levees was a fresh water reservoir used in watering their rice crop, then it was alleged that the appellant, its agents, servants and employees knew or in the exercise of ordinary care should have known that the area enclosed within the levees was a fresh water reservoir and was then being used in connection with watering appellees' rice crop. Appellant, its agents, servants and employees were negligent in pumping salt water, spoil and silt into said reservoir and such acts of negligence were a proximate cause of and resulted in the damages previously set forth in the petition.

The following acts were alleged as specific acts of negligence on the part of the appellant:

(a) In pumping spoil, salt water and silt into an area where the terrain and drainage on the Gallier tract sloped in the direction of such fresh water canal; and in pumping salt water, spoil and silt into the fresh water canal or lead ditch;

(b) In failing to construct a levee or levees so as to prevent salt water, spoil and silt from flowing into appellees' fresh water canal or lead ditch;

(c) In failing to comply with the instructions contained on the plans and specifications on the contract entered into by the appellant with the United States government to the effect that no spoils or salt water should be permitted in said fresh water canal;

(In pumping salt water, spoil and silt into appellees' fresh water reservoir after being told by F. W. Tully that such area was a fresh water reservoir and was being used to water his rice crop;

(c) In failing to inquire of the office of the U. S. Engineers if it was proper to pump spoil in appellees' fresh water reservoir after being notified of same;

(f) The failure of appellant's agent, Clovis Duplechan, to make inquiry of his superiors as to whether they should pump salt water and spoil in appellees' fresh water reservoir;

(g) That appellant, its agents, servants and employees were negligent in failing to ascertain that they were in fact pumping into appellees' fresh water reservoir which was a part of his water system used to water their rice crop;

(h) In pumping salt water, spoil and silt in the fresh water reservoir when appellant knew or in the exercise of ordinary care should have known that same was a fresh water reservoir and was used to water appellees' rice crop;

(i) In failing to ascertain the location of said fresh water canal and reservoir upon an inspection of the area adjacent to the canal on the north prior to beginning said work.

Further pleading in the alternative, it was alleged that the appellant's agents, servants and employees were advised on July 18, 1952 by L. W. Tully that they were pumping spoil and salt water into his lead ditch and fresh water canal and also advised its agent, Captain Ohlhausen, that he had a fresh water reservoir adjacent to said lead ditch which contained fresh water and was then being used to water his rice crop. Ohlhausen informed Duplechan, appellant's superintendent, of such fact prior to the time its agents, servants and employees began pumping spoil into the fresh water reservoir on July 19, 1952. The act of appellant's agents, etc., in pumping salt water into the reservoir after being advised of its use to water rice was done willfully and maliciously and appellant's agents were guilty of gross negligence in doing so and appellees should recover exemplary damages in the sum of $25,000 for such conduct.

The petition also alleged an alternative measure of damages, setting out in addition to that as to damages to the rice crop two other computations of damages because of injury to their rice crop which show the amount to be $33,414.40.

Appellant answered by special exceptions, general denial and a counterclaim. Such counterclaim disappeared in the course of the trial and it is not included in the matters on appeal.

The appellant, by way of special exceptions, alleged as follows:

(1) Plaintiffs' petition does not state a cause of action at law, and defendant prays that the petition accordingly be dismissed with costs, save and except defendant's counterclaim.

(2) That the United States of America is a necessary and indispensable party and is the real party in interest to this cause of action and the original petition filed by plaintiffs is fatally defective by reason of the nonjoinder of a necessary and indispensable party and the real party in interest and plaintiffs' cause of action should accordingly be dismissed.

(3) That by reason of a perpetual right and easement to discharge dredged material upon plaintiffs' land which is held by the United States of America, the defendant, as a contracting agent for the United States, had at all times mentioned in plaintiffs' petition, a paramount legal right to deposit dredged material upon the land described in plaintiffs' petition, irrespective of how said land was used and plaintiffs, in fact and in law, were trespassing or encroaching upon a perpetual easement held by the United States and under which defendant performed dredging services described in plaintiffs' petition.

(4) That the defendant, as a government contractor cannot as a matter of law be sued by the plaintiffs.

The record does not show what action, if any, was taken by the trial court in regard to these exceptions.

Appellant filed a motion for summary judgment, attached to which were several affidavits, a copy of the right of way and easement from the McFaddin Trust to the United States of America and a copy of the contract between the United States of America and the appellant, Bauer-Smith Dredging Company. This motion was overruled.

The cause was tried to a jury. The jury by its verdict found as follows:

In answer to Special Issues 1 to 17, it found the yield of rice from the various tracts was decreased as a proximate result of the act of the appellant in placing spoil and salt water in the fresh water canal reservoir, and found the amount of the probable yield in rice if the salt water and spoil had not been placed in the canal and reservoir, the number of barrels actually produced and the cost of cutting, hauling and harvesting the rice;

That the lead ditch and fresh water canal were damaged as a proximate result of permitting spoil and salt water to enter the canal, and damages thereof were found to be $1,450;

That the fresh water reservoir was damaged as a proximate result of the appellant's pumping spoil and salt water into it and damages were fixed at $8,000;

That the Tullys incurred $1,250 additional expenses in the operation of their irrigation system as a proximate result of spoil and salt water in the lead ditch;

That Clovis Duplechan, appellant's superintendent, knew of the existence of the fresh water reservoir before the dredging started pumping spoil and salt water directly into said reservoir, and that Duplechan, with such knowledge, willfully and intentionally ordered the pumping of spoil and salt water into the reservoir; that appellees should be awarded $12,500 as exemplary or punitive damages for such willful and intentional act; that the word "material" as used in the plans which provide: "No material shall be allowed to enter this canal" included spoil and salt water; that appellant was negligent in permitting spoil and salt water to enter the fresh water canal and such negligence was a proximate cause of the damages; that L. W. Tully notified appellant's agent, W. H. Ohlhausen, on July 18, 1952 of the existence of the fresh water reservoir.

That defendant was negligent in pumping spoil and salt water into plaintiffs' fresh water reservoir after notice of the existence of the reservoir, and such negligence was a proximate cause of the damages sustained by appellees.

That appellant's superintendent, Clovis Duplechan, after being notified of the existence of the reservoir, prior to pumping salt water therein, failed to inquire of the United States Army Engineers if it was proper to pump spoil and salt water into plaintiffs' reservoir; that such failure was negligence and a proximate cause of plaintiffs' damages.

That defendant, its agents, etc., knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water reservoir prior to pumping spoil and salt water into said reservoir on or about July 19, 1952; that such act was a proximate cause of the damages sustained by plaintiffs.

That defendant or its agents, etc., knew or in the exercise of ordinary care should have known of the existence of plaintiffs' fresh water canal and lead ditch prior to permitting spoil and salt water to enter the canal on or about July 18, 1952, and that the act of permitting spoil and salt water to enter the canal and lead ditch was a proximate cause of the plaintiffs' damage.

That defendant deposited material taken from the Intracoastal Canal on Friday, July 18, 1952 in a place on the north side of the canal not provided in its Federal contract for the deposit of material and such act contributed to the damages sustained by the plaintiffs.

The defendant deposited material on Saturday, July 19th and 20th, 1952, in a place on the north side of the canal not provided in its Federal contract for deposit of material, and such acts contributed to the damages sustained by the plaintiffs.

All such findings are supported by the evidence.

On the verdict of the jury the court entered judgment in varied amounts in favor of the several appellees and against the appellant.

The appellant filed a motion for judgment non obstante veredicto, which was by the court overruled.

The appellant filed a motion for new trial, and later its amended motion for new trial, which was overruled. This amended motion for new trial, among other things, complains of the refusal of the trial court to grant its motion for instructed verdict, but no motion for instructed verdict is found in the transcript.

The appellant in its motion for judgment non obstante veredicto presented its contention that it was entitled to judgment because the interests of each and all of the plaintiffs in the trial court, appellees here, are held subject to the deed and covenant whereby their predecessor in title, the McFaddin Trust, granted to the United States of America a perpetual right of way and easement across the land involved in this suit, the McFaddin lands adjoining the Intracoastal Canal on the north side; that said deed and covenant included the right of the government to construct and maintain a canal and right of way and provided an easement to deposit dredged material during the construction and maintenance of the Intracoastal Water Ways on the land of the parties adjoining the land conveyed, reserving to the grantors only such rights and privileges in said land not converted into public navigable waters as may be enjoyed without interfering with or abridging the rights and easements conveyed by said instrument. Appellant stated that its acts and conduct so far as they are related to this cause of action were done and performed in behalf of the United States under the grant of the above easement. It further contended that the work done on which plaintiffs' petition was based was performed by the appellant pursuant to a contract with the United States Government and under the direction of the Secretary of War and under the supervision of the Chief of Engineers, and that this is shown by the uncontroverted evidence in the case. It further says that the undisputed evidence is that the appellant no where exceeded its authority under the contract with the United States in performing the acts complained of in this suit.

The appellant brings its appeal before this court almost entirely upon the defense stated above, taken from its motion for judgment non obstante veredicto. Such defense to the suit of the appellees is presented under its first, second, third, fifth and sixth points. By its fourth point complaint is made of recovery for damages to the realty by certain of the appellees, who do not own more than a leasehold in the property.

Appellant's points are worded as follows:

"FIRST POINT

The trial court erred in failing to recognize the defendant's defense that the plaintiffs had previously given the United States Government the right of way and easement to do the very things made the basis of this suit—to dump spoil on the land of the plaintiffs in the area involved in this suit.

"SECOND POINT

The trial court erred when it refused to rule that there can be no recovery from this defendant contractor because the acts complained of were legally authorized by the government to improve navigation and such acts should be regarded as the acts of the government and not the personal acts of the contractor.

"THIRD POINT

The trial court erred when it failed to recognize that there can be no recovery as a matter of law against a government contractor on the ground that he has abused a discretion given him by the government.

"FOURTH POINT

There can be no recovery for damages to the realty because the plaintiffs who own the land are not seeking damages with respect to the realty, and the plaintiffs who are tenants upon the land and who are seeking such damages have no proper interest therein upon which to predicate such a claim.

"FIFTH POINT

The damages alleged do not constitute a taking of property but were merely consequential for which there can be no recovery.

"SIXTH POINT

The court erred in submitting Special Issues 24, 25 and 26, because the defendant had a right, under the land and under the easement, to deposit spoil where it did and the acts of Duplechan in so doing could create no liability for exemplary or punitive damages."

We first consider the appellant's fourth point, which is its only point which is not based solely upon the appellant's contention that it is immune from liability to the appellees because of the contract it had executed with the United States of America, and because of the easement granted by the McFaddin Trust to the United States of America. Under the fourth point appellant argues that the appellees fully had no interest in the land involved in the suit except such interest as they had by virtue of the lease to them by the McFaddin Trust; that they as tenants had no right of action for injury to the land itself and that recovery by a tenant is limited to the value of the crop

lost. Appellant also attempts under this point to argue that the evidence does not support the findings of the jury in regard to the damages suffered by the Tullys, but we feel this argument is not properly brought under this point. By the wording of the point itself any argument or contention thereunder is limited to the question whether the appellees Tully have any right of recovery here because of their status only as tenants of the land which was damaged. The Tullys, as lessees in the 10-year lease from the McFaddin Trust, could recover for specific injuries to their leasehold estate in like manner as the owner of the fee may recover for injuries to the fee. Travelers Insurance Co. v. Key, 146 S.W. 2d 813. The evidence shows that the Tullys had expended approximately $200,000 upon the lands they had leased. A large amount of this expenditure was for the construction of canals, ditches, levees and reservoirs. Their lease was for a term of 10 years and expired January 1, 1957. At the time of the injuries complained of, in 1952, the lessees had the prospect of enjoyment of the benefits of their leasehold for an additional 4 years. We think it is evident that their use and enjoyment of the leasehold estate in the lands for the remainder of the lease period was injured by damage to the canal and reservoir, and that the appellees Tully rightfully recovered damages for such injury in the judgment of the trial court.

The land owners themselves, however, were parties to the suit as plaintiffs and by such joinder as plaintiffs they have agreed to such recovery by their tenants. The appellees therefore regard the injuries to the ditches, canals and reservoirs as injuries to the leasehold rather than to the fee estate.

We find no error presented by this point and it is overruled.

Before we consider the five remaining points of the appellant, we must decide upon the contention of the appellees that all the points raised by appellant in its points 1, 2, 3, 5 and 6 should not be considered, and that matters therein contained were never properly before the trial court. Appellees contended on the trial and contend here that the appellant's solo pleading of a general denial of the appellees' allegations charging a trespass operated only to deny the act of trespass itself. They say that any special defenses of justification or excuse could not be considered over the objection of appellees that such special defenses were not available under a general denial. They say that if the appellees by their evidence had shown ownership and lease of the lands and that the appellant pumped spoil and salt water into their fresh water reservoir located thereon, thereby committing a trespass, they made out a prima facie case of trespass against the appellant and it could not introduce evidence under its plea of general denial in regard to any special defenses, such as denial of appellees' title to or right of possession of the lands, superior rights under an easement, justification or excuse. They make this same point in regard to the defense the appellant made on the basis of its contract with the United States of America, Department of the Army.

After a long and tedious examination of the record and the reply briefs and counter reply briefs of the parties, we overrule this contention of the appellees and conclude that the basic point of complaint by the appellant is before us for determination.

In their original petition the appellees pleaded that appellant entered into a contract with the United States of America, Department of the Army, to do certain dredging work on the Intracoastal Water Ways. They alleged and pleaded certain parts of the contract and in one alter-

native plea the appellees alleged that the appellant, its agents, servants and employees were notified on the plats and specifications under which they were operating not to pump spoil upon certain areas shown on such maps. The contract between the United States and the appellant was introduced in evidence, and we think properly so. Since the appellees themselves pleaded the existence of the contract complained of, the appellant was not required to allege the existence of such a contract in order to rely upon it as a defense. By this holding we do not intend to approve as correct the indirect manner by which the appellant seeks to bring before us its claim of immunity from liability because of the fact that it was performing a contract for the government. The contention would have been more clear had it been contained directly and concisely in its answer. However, it did raise the point in its motion for judgment non obstante veredicto, and also set it out in its amended motion for new trial. We therefore believe that it was before the trial court and is properly preserved for review.

The controversy as to the easement granted by the McFaddin Trust to the United States of America to dredge and construct and maintain the Intracoastal Water Ways on the McFaddin Trust lands is more difficult to decide. Appellant did not mention it in its answer but did make some reference to it in its cross action and exceptions. It alleged it in its petition for removal to the United States District Court and it is set forth in its motion for summary judgment. The easement, however, was introduced in evidence early in the trial while the witness W. P. H. McFaddin, Jr., one of the trustees of the McFaddin Trust, was testifying as a witness. He identified it and said, "that looks like it." Counsel for appellees made no objection to introduction in evidence of this easement, but merely made

the statement that if there was any conflict between the instrument introduced and the recorded instrument "we will use the one in the clerk's office." Later in the course of the trial, during the cross examination of L. W. Tully, almost the entire instrument was read to him during his cross examination and he was asked some questions about it.

In its motion for judgment non obstante veredicto the appellant presented its contention that because of the execution of the easement by the McFaddin Trust to the United States of America, the United States of America was granted the right to deposit dredged material during the construction and maintenance of the Intracoastal Water Ways on the lands adjoining the tract or parcel of land conveyed for the canal, and contended that its acts were performed in behalf of the United States under the grant of the easement. Since the easement was in evidence and this contention was made in the motion for judgment non obstante veredicto and in the motion for new trial, we think the appellant's contention was before the trial court and was properly preserved for review on appeal.

On October 3, 1928, the McFaddin Trust executed a right of way deed to the United States of America to a parcel of land across its lands in Jefferson County. This instrument recognized the fact that the United States of America was constructing, improving and maintaining an intracoastal water way from the Mississippi River at or near New Orleans, Louisiana, to Galveston Bay, Texas, in accordance with a project duly authorized by Congress, and that the tract or parcel of land conveyed was required for canal and right of way purposes in connection with said work of improvement. The instrument contained the following clauses:

". . . grant, bargain and sell unto the said party of the second part and its assigns (the United States of America) the perpetual right and easement to enter upon, dig or cut away and remove any or all of the hereinbefore described tract of land as may be required at any time in the prosecution of the aforesaid work of improvement or any enlargement thereof, and maintain the portion so cut away and removed as a part of the navigable waters of the United States; and the further perpetual right and easement to enter upon and use any portion of said tract or parcel of land as herein conveyed, not so cut away and converted into public navigable waters as aforesaid, for the deposit of dredged material, and for such other purposes as may be needful in the preservation and maintenance of the said work of improvement; and the further perpetual right and easement to deposit dredged material during construction and maintenance of the waterway on the land of the parties of the first part adjoining the tract or parcel conveyed."

"TO HAVE AND TO HOLD the said rights and easements unto the said party of the second part, the United States of America, and its assign, for the purpose aforesaid, forever . . ."

". . . And the said parties of the first part for themselves and for their successors and assigns, do hereby covenant with the party of the second part to warrant and defend the title of the same to the said party of the second part and its assigns against the lawful claims and demands of all persons by, through or under the said parties of the first part."

"The parties of the first part do hereby waive and release the United States of America, its officers, agents, servants and contractors, from any and all claim for damages which may result from the careful and prudent construction and maintenance of the waterway, and the deposit of spoil or other matter as hereinbefore stated in a careful manner; . . ."

The appellant contends that this easement conveyance constitutes a valid and complete defense to this suit against it as a matter of law. It says that the instrument was obviously obtained for the very purpose of preventing just such a lawsuit as this one—landowners and tenants complaining because the government's contractor, in order to preserve and maintain the intracoastal canal, has pumped spoil onto the adjoining land. It points out that the instrument provided that the use of their land by the landowner and its assigns should not *"interfere with or abridge the rights and easement conveyed."* It says that when landowners and their tenants, after the granting of the easement, used as a fresh water reservoir a part of the lands on which the government was granted the right to dump spoil from the canal, such use interfered with or abridged the right and easement conveyed to the government. Appellant argues that there can be no liability for dumping spoil or dredging material upon the lands of the appellees here for the reason that the United States had been given specifically the right to do so. It cites and relies on the cases of Lynn v. United States, 110 F. 2d 586; Bedford v. United States, 192 U.S. 217, 24 S. Ct. 238, 48 L. Ed. 414; Atchley v. Tennessee Valley Authority, 69 F. Supp. 952; Griffeth v. Utah Power & Light Company, 226 F. 2d 661. These authorities support, in part, the contention of the appellant. They are authority for the

proposition that the United States itself had the right to dump spoil and dredging material on the lands of McFaddin Trust involved in this suit. The right of way easement and grant therefore would be a defense in law to a suit of the appellees against the United States of America. The government, however, is not a party to this suit. The suit is against the appellant, a contractor for the government, charging it with having carried out its contract in a negligent and willful manner and with having committed a trespass against the appellees, and with having exceeded in its actions the authority and directions given to it by its contract with the government. The appellant in its brief throughout all of the five points under discussion seeks to identify itself and its acts with the United States Government. But its acts of negligence and willfulness and its actions in dumping spoil and dredging material at places not designated for such dumping in its contract, were not the acts of the United States Government and appellant is not protected from liability by the easement granted by the McFaddin Trust to the United States Government. Where an agent or officer of the government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. Yearsley v. Ross Construction Company, 309 U.S. 18, 60 S. Ct. 413. See, also, Converse v. Portsmouth Cotton Oil & Refining Corp., 281 F. 981, (certiorari denied). This case involved a suit against a dredging contractor where the defense was made that the contractor was not liable for any injuries caused by him because he was engaged in the performance of a government dredging contract. That defense was not recognized and liability of the contractor was upheld. See, also, 69 A.L.R. 489.

The appellant here had the right under the easement and his government contract to dump spoil with impunity on the lands of appellees, only at such places as his contract directed him to dump it. When it placed spoil at any other place, such act was not the act of the government, but was Appellant's own act, for which it is liable.

We think the evidence supports the findings of the jury that the appellant was negligent in the performance of his contract and exceeded the authority granted and directions given in its contract with the government. It is noted that in none of its points of error on appeal does the appellant complain of the sufficiency of the evidence in any way. The appellant here was guilty of conduct making it liable to appellees, and the trial court did not err in so holdnig.

In connection with its argument that it cannot be liable for injuries to the appellees here, appellant asserts that when it completed its dredging contract with the United States Government the government inspected its work and issued it a certificate of completion of the contract; that this amounted to an adoption by the United States of all its acts and that the acts complained of and charged against it in this suit became the acts of the United States Government by adoption. We do not believe that it can be said here that the certificate by the government that the appellant had completed its work satisfactorily to the government amounts to an adoption and approved of the acts complained of by the appellees. The fact that the canal itself had been properly cleaned and dredged by the operations of the appellant to the satisfaction of the government cannot have the meaning in law that the govern-

ment adopted as its own act the wrongful dredging of spoil upon the property of the appellees to their injury. The acts complained of here were done in a negligent and willful manner, outside of the provisions and directions in the contract itself. The wrongful portion of appellant's acts did not affect the dredging to the required depth and width. The wrongful acts did not affect the government's interest in the operation. The government suffered no harm by them. They were the agents own tortious acts. If the actions of a government officer or agent are wrongful and are such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him. Larson v. D. & F. Commerce Corp., 337 U.S. 682, 69 S. Ct. 1457.

We overrule the appellant's points Nos. 1, 2, 3, 5 and 6. All are based on the assumption that the appellant had a right under the easement and under his contract with the United States Government to deposit spoil where it did, regardless of what additional facts were shown and found by the jury. We do not believe that the authorities are in support of this position on the part of the appellant, but on the other hand believe that the authorities are to the contrary.

We find no error presented by the appellant's points and the judgment of the trial court is affirmed.

H. L. MURRAY,
Chief Justice

HIGHTOWER, Associate Justice,
Disqualified and not sitting.

Rulings of the Supreme Court of Texas

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the Ninth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicant, Bauer-Smith Dredging Company, and surety, Aetna Insurance Company, pay all costs incurred on this application. Dated April 16, 1958.

* * *

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and hereby is, overruled. Dated May 14, 1958.

* * *

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing is a true and correct copy of the judgment on application for writ of error and order on motion for rehearing of application for writ of error of the Supreme Court of Texas, in the case numbered and styled above, as the same appear of record in the minutes of said Court.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 6th day of June, 1958.

/s/ GEO. H. TEMPLIN
Geo. H. Templin, Clerk.

Opinion of the United States District Court For the Eastern District of Texas, Beaumont Division

Opinion of the U. S. District Court

DAWKINS, SR., J.

Plaintiffs sued in the State Court the contractor and its agents under a dredging contract with the Government, for damages alleged to have been caused to its rice crop by depositing spoil and pumping brackish or salt water into certain streams and a basin in violation of the terms of the contract with the Government. The cause of action, as the complaint states it, does not charge any wrongful act by the United States, but that the contractor, through its agents, willfully trespassed upon plaintiff's property in the manner stated.

Both plaintiffs and defendants are citizens of Texas.

Defendant Dredging Company removed the case to this Court on the contention that it involved the interpretation of the Federal Constitution and Statutes. It asserts that the Government is an indispensable party, or in any event, interstate commerce is involved; and further, that the matter falls within the maritime jurisdiction of this Court.

Without finding it necessary to engage in an extended discussion of the authorities relied upon by the respective parties, it is felt sufficient to say that plaintiffs chose to pitch their case on the contention that the defendants had committed a willful trespass, entirely outside of and beyond the provisions of their contract, whether induced to do so by the Board of Engineers or not. It seems to go with-

out saying that plaintiff will have to make good on its proof, and if it fails to do so, will simply lose its case. If the engineers have exceeded their authority under the contract, this would be no more binding upon the plaintiff than what was done by the defendant and its agents. Both would be liable in tort.

Of the many cases cited and quoted from by the parties, it is thought that the following most nearly fit the situation presented by the present action: Nakasheff vs. Continental Insurance Comany, 89 Fed. Supp. 87; Rosecrans vs. Losier, Inc., 142 F. 2d 118; and Payne vs. Fite (5th Cir) 184 F. 2d 977.

There being no federal question involved and the parties both citizens of Texas, the case should be remanded to the State Court where it originated. Proper decree may be presented.

DONE AND SIGNED in Chambers in Beaumont, Texas, this 19th day of November, 1953.

/s/ BEN DAWKINS
Judge

FILE COPY

MOTION FILED AUG 14 1958

IN THE

Supreme Court of the United States

October Term, 1958

No. 250

BAUER-SMITH DREDGING CO., INC.,
Petitioner-Defendant below,

v.

ROY TULLY, ET AL.,
Respondents-Plaintiffs below.

Petition for Writ of Certiorari to the Court of Civil Appeals Ninth Supreme Judicial District, Beaumont, Texas

MOTION OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT THEREOF

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August 14, 1958

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MOTION OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Association of River and Harbor Contractors, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully moves for leave to file the brief annexed hereto in support of the Petition for a Writ of Certiorari.

Consent to the filing of said brief was granted by petitioner but was denied by respondents.

The members of The National Association of River and Harbor Contractors, consisting of 29 companies,*

* The names of member companies are:

American Dredging Company
Philadelphia, Pa.
Arundel Corporation, The
Baltimore, Md.
Atkinson Dredging Company
Norfolk, Va.
Atlantic, Gulf & Pacific Co.
New York, N. Y.
Construction Aggregates Corp.
Chicago, Ill.
Cottrell Contracting Corporation
Norfolk, Va.
Dunbar & Sullivan Dredging Co.
Detroit, Mich.
Fitz Simons & Connel Dredge & Dock Division
Chicago, Ill.
Franks Dredging Company
Long Beach, Calif.
Gahagan Dredging Corporation
New York, N. Y.
General Construction Company
Seattle, Wash.
Gibson & Cushman, Inc.
Bay Shore, L. I., N. Y.
Gillen, Edward E., Company
Milwaukee, Wisconsin
Great Lakes Dredge & Dock Company
Chicago, Ill.
Hawaiian Dredging & Construction Company, Ltd.
Honolulu, T. H.
Hill Dredging Corp.
Atlantic City, N. J.
Hydraulic Dredging Company, Ltd.
Oakland, Calif.
Jahncke Service, Inc.
New Orleans, La.
McWilliams Dredging Company
New Orleans, La.
Merritt-Chapman & Scott Corporation
New York, N. Y.
Merritt Dredging Company
Charleston, S. C.
Norfolk Dredging Company
Norfolk, Va.
North Atlantic Dredging Company
East Boston, Mass.
Pacific Dredging Co.
Paramount, Calif.
Perini Corporation-Marine Division
East Boston, Mass.
Price Brothers-McClung, Inc.
Toledo, Ohio
Puget Sound Dredging Co.
Seattle, Wash.
Standard Dredging Corporation
New York, N. Y.
Western Contracting Corporation
Sioux City, Iowa

include substantially all of the companies engaged in dredging work in the United States. Dredging work is done by members of the Association under contracts whose terms and conditions, including those relating to disposal of dredged material on riparian lands, are similar, if not identical, to those involved in the dredging project which is the subject of the present litigation. It has long been the understanding of the dredging industry, and heretofore undisputed, that the rights and immunities obtained by the United States from riparian landowners under dredging easements were available to dredging companies as defenses against claims for damages by servient riparian landowners where the dredging companies had complied with all of the conditions in the contracts, including those relating to disposal of dredged material, and where the United States has supervised and formally approved and accepted *all* work done under the contracts, including the manner and areas in which the companies had deposited the dredged material. It has long been accepted that issuance of Certificates of Completion by the United States to the dredging companies, and payment for all services rendered under the dredging contracts, constitutes approval, adoption and ratification by the United States of the acts of the dredging companies in prosecuting the dredging contracts to their conclusions, including acts relating to the disposal of dredged material.

It has also been the belief of the dredging industry that, if a suit were to be instituted in a State Court by a riparian landowner for alleged damages to his property as the result of the performance of a dredging contract with the United States, the dredging company would have the right to remove the action to a Federal

District Court where the United States could be impleaded as an indispensable party.

The decisions of the Texas State Courts and of the United States District Court for the Eastern District of Texas, Beaumont Division, which are contrary to the above understandings of the dredging industry, are also in conflict with the decisions of this Court, and are therefore of immediate interest and grave concern to the dredging industry, since those decisions seriously affect substantive and procedural rights and obligations under existing and prospective dredging contracts with the United States. Indeed, the issues presented by this litigation are also of vital concern to the United States, which ultimately must bear the cost of maintaining and improving our navigable waters.

It is therefore respectfully submitted that the issues here involved have a broader consequence and transcend the interests of these particular litigants, and that the views of the dredging industry, as presented by this Association, will be of assistance to this Court.

Respectfully submitted,

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The National Association of
River and Harbor Contractors

Of Counsel:
KIRLIN, CAMPBELL & KEATING

August 14, 1958

IN THE

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OCTOBER TERM, 1958

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BRIEF OF THE NATIONAL ASSOCIATION OF RIVER AND HARBOR CONTRACTORS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

The interest of The National Association of River and Harbor Contractors in this cause is set forth in its motion to which this brief is annexed.

SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

A. The Decisions of the Texas Courts Are Not in Accord With Decisions of This Court

As indicated in Petitioner's Statement of the Case (Pet., 9 et seq.) and in the opinion of the Court of Civil Appeals, Ninth Supreme Judicial District of Texas (Pet. Blue App., 25 et seq.), the instant litigation involves a contract between petitioner, a Texas dredging company, and the United States, acting through the Department of the Army, for dredging the Intracoastal Canal under the supervision of the Corps of Engineers. Under the terms of the contract, petitioner was required to deposit, and did deposit,** dredged material on respondents' land adjoining the canal in spoil areas which were designated in the contract plans and specifications.

Under an easement granted by respondents (quoted in Petition at p. 25, et seq.), the United States had the right to dump spoil and dredged material on the lands of respondents in the precise areas where it was deposited by petitioner. Indeed, the Texas Court of Civil Appeals itself held that—

** Respondents apparently recovered damages allegedly caused by the deposit of dredged material in respondents' fresh water reservoir and irrigation system, as well as the flow or seepage of dredged material and salt water into a lead ditch, plus resulting injury to a rice crop seven miles away. Although the dredging chart contained a notation that "no dredged material shall be allowed to enter" the lead ditch (Pet. Blue App. 26), the drawing and specifications did not contain any reference to respondents' fresh water reservoir or irrigation system. Furthermore, *all* of the dredged material was deposited in areas designated in the dredging contract, including that which allegedly flowed or seeped into the lead ditch; and the Government did approve and adopt petitioner's acts relating to the manner and areas in which the dredged material was deposited.

"The right of way easement and grant therefore would be a defense in law to a suit of appellees against the United States of America" (Pet. Blue App. 46-47).

At the conclusion of the work, the United States, acting through the Army Corps of Engineers, inspected the dredged material deposited on respondents' land, and, with full knowledge of respondents' assertion of a claim for damages, issued to petitioner a Certificate of Completion (quoted at p. 10 of Petition), certifying that the work was performed *in accordance with the contract terms*, which necessarily included approval of the place and manner in which the dredged materials had been deposited in spoil areas designated in the plans and specifications, and paid petitioner in full for the work it had performed.

Despite the fact that the United States had the right under easement to do exactly what was done here by petitioner without incurring any liability, and despite full Government approval, adoption and ratification of petitioner's acts as evidenced by the Certificate of Completion, suit was filed by respondents and a judgment was entered against petitioner at the trial court level for trespass and damages incurred as a result of petitioner's performance of its dredging contract in a manner which respondents claimed exceeded the authority and directions set forth in the Government contract. The Court of Civil Appeals affirmed on the ground petitioner had negligently and wilfully dumped spoil and dredged material "at places not designated for such dumping in its contract" (Pet. Blue App. 47).

The decision of the Texas Court of Civil Appeals rested upon an erroneous application of the principle that an agent or officer of the Government may be

held personally liable where he has exceeded his authority or where the authority granted to him has not been validly conferred (Pet. Blue App. 47), citing *Yearsley* v. *Ross Construction Company*, 309 U.S. 18, and *Converse* v. *Portsmouth Cotton Oil & Refining Corp.*, 281 F. 981, and on the erroneous conclusion that the United States did not and could not approve, adopt and ratify acts (Pet. Blue App. 48-49) which the Government itself could have lawfully done, under specific easement and the applicable statutes.

Since the United States had the right under easement to deposit dredged material exactly where petitioner did deposit it, it is obvious that the Texas Court erred in concluding that the United States, acting through its duly designated officials, could not lawfully authorize, direct, approve, adopt and ratify the manner and place in which petitioner was to deposit and did deposit the dredged material. It is equally clear, from the terms of the Certificate of Completion and the circumstances under which it was issued, that the United States did in fact consider that petitioner had fully and properly complied with the contract requirements relating to the deposit of dredged material, and approved, adopted and ratified petitioner's acts in respect thereto.

Not only is the decision of the appellate court erroneous on its face, but also it is in direct conflict with *Yearsley* v. *Ross Construction Company*, 309 U.S. 18, wherein this Court noted that "there is no contention, *or basis for one*, that if the contractor was acting for the government in prosecuting its work in the aid of navigation without the taking of property, the contractor would be subject to the asserted liability." (309 U.S. at 23).

See also *General Box Company* v. *United States*, 351 U.S. 159, wherein this Court held that, since a Louisiana Levee Board had the right to destroy certain timber without compensating the owner, and since it had granted that right to the United States, the owner of the timber was not entitled to recover just compensation from the United States under the Federal Constitution for timber destroyed by the Government contractor. So in the instant case, since the United States had the right under easement to dump the spoil where petitioner did, and directed, approved and ratified petitioner's acts, respondents are not entitled to recover damages from petitioner.

Furthermore, since the United States had the right under the Commerce Clause of the Constitution, the Rivers and Harbors Acts (Pet. App. 1-4), and the specific dredging easement to do precisely what was done here by petitioner, whose performance was approved and adopted by the United States, there was no duty owing to respondents and no invasion of a legal right upon which respondents could base a claim for damages. See *Larson* v. *D. & F. Commerce Corp.*, 337 U.S. 682 at 693.

The decision below is also in conflict with the well-established principal in the field of agency that "An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have the agent do it and has authorized the agent to do it." *Restatement of the Law of Agency*, Section 343 and 345.

Converse v. *Portsmouth Cotton Oil & Refining Corp.*, 281 F. 981, relied upon by the Court below, is not in point for the reason that the dredging contract there did not *specify*, as did the one in the present

litigation, and as do many present-day dredging contracts, the areas in which dredged material was to be deposited.

B. The Case Presents Issues of Importance to the Dredging Industry, the United States, and the American Taxpayer

The issues presented in this case, as listed at pages 3 to 6 of the Petition, are a matter of concern not only to the particular litigants, but they are also of vital interest to all dredging companies, the United States, and ultimately to the taxpaying public. To illustrate—

As noted at page 19 of the Petition, a substantial number of dredging projects involving millions of dollars (over 1.6 billion dollars was appropriated by Congress for rivers, harbors, canals and flood-control projects in 1958) are authorized each year by Congress. Many of these contracts cover the dredging of miles of navigable inland waterways and require the deposit of dredged material on countless acres of riparian land. The cost involved in disposing of dredged material is of course a most important factor to dredging companies, and in the final analysis to the United States and the American taxpayer. The Government and its dredging contractors have long been accustomed to rely upon dredging easements and the rights and immunities granted to the United States thereunder in order to dredge channels in the most efficient and least costly manner possible. They have not considered it necessary to include in their estimates and bids a reserve to cover possible contingent liability to riparian owners who had already granted to the United States the right to dredge and deposit spoil on their properties. However, if the dredging

contractors, in fulfilling their contractual obligations to the United States, are at the same time to be exposed to liability for damages claimed by servient riparian landowners based upon an alleged breach of the contract with the United States, the dredging companies will be compelled to include in their future bids a reserve to cover these contingent liabilities to adjacent landowners. Inevitably, if the decisions below are permitted to stand, the United States and the American taxpayer will be confronted with an increase in the cost of dredging and maintaining navigable waterways.

Manifestly, therefore, it is a matter of grave concern to the dredging industry, to the United States, and to the public, as to whether the easement rights and immunities granted to the United States by servient riparian landowners are available to dredging companies who deposit dredged material in areas covered by easements which are specifically designated in contract plans and specifications. Also of concern is the question as to whether riparian landowners, who would not be entitled because of the dredging easements to recover damages in a suit filed directly against the United States, could in effect nullify the easement rights and obtain compensation from the United States by the indirect procedure of suing the dredging contractors, who in turn would seek reimbursement from the United States. These, among other issues, are clearly of sufficient public importance to warrant their resolution by this Court.

Closely related to the foregoing, and also of grave concern to the dredging industry, is whether the Texas Court was correct in taking the apparent position that a Certificate of Completion applies only to that part

of a dredging contract relating to cutting the channel to a specified depth and width, but it does not apply to the manner and areas in which the dredged material is to be deposited although specified in the contract, and that the Certificate of Completion cannot be construed as approval and adoption by the United States of the contractor's acts in respect to disposal of the dredged material. Certificates similar to the one here involved are issued at the conclusion of every Government dredging contract, and their issuance has always been considered by the contracting parties as evidence that the contract *in its entirety* has been satisfactorily performed. Obviously, the force and effect to be given to such certificates, and particularly whether such certificates are evidence of United States approval, adoption and ratification of the manner and areas in which dredged material has been deposited, is an issue of utmost importance to the dredging industry, to the United States, and eventually to the taxpaying public.

The principal ground upon which the decisions below rested was that the dredging company had not complied with contractual requirements. Here again, it is of vital importance to all dredging companies and to the United States to know whether, contrary to what they conceived to be the law, strangers to a dredging contract can attack a formal determination by the United States, acting through the Army Corps of Engineers, that the dredging company has complied with and has satisfactorily performed all of the contractual requirements, and whether persons who are not parties to the contract can recover damages based upon an alleged breach thereof.

The decision and order of the United States District Court for the Eastern District of Texas (Pet. Blue App. 51-52) remanding the present case to the local courts of Texas, and the decisions of the State Courts, also present jurisdictional questions of serious concern to the members of this Association. As a result of the decisions below, dredging companies in general are now confronted with the possibility of being sued in State courts where they are deprived, as was petitioner here, of the right to implead the United States as an indispensable party and to have a Federal court decide the Federal questions involved in controversies with riparian landowners. If they are sued and lose, they will be faced with the necessity of seeking to obtain reimbursement from the Federal Government in the Court of Claims or the District Courts for damages recovered by riparian landowners, and thus will be subjected to an unnecessary multiplicity of suits.

It would also seem that the other jurisdictional issues raised in the Petition, i.e., whether respondents' claim involves Federal questions, whether such a claim is within the exclusive admiralty jurisdiction of the Federal courts under 46 U.S.C. 740, and whether uniform principles of maritime law and procedure are applicable to claims of this sort, are all of sufficient importance to the dredging industry, and indeed to the United States as a party to dredging contracts, to warrant the grant of the Petition for a Writ of Certiorari.

CONCLUSION

For the reasons set forth in the Petition, as well as those referred to above, it is respectfully requested that this Court issue a Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas.

Respectfully submitted,

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